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In The

Supreme Court of the United States

October Term, 2000

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ELIZABETH SANDERS and JAMES SANDERS,

Petitioners,

– against –

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. Whether a presumption of vindictiveness is warranted when a prosecutor, without any good-faith basis for believing that she may have committed a crime, threatens to seek an indictment against the wife of a journalist unless he reveals the identity of a confidential source, and then follows through on the threat when the journalist refuses to compromise his constitutionally-protected right to report and gather news by disclosing the source.

2. Whether a jury should be permitted to consider circumstances indicating that the defendants' conduct did not involve any conscious deprivation or harm as a basis for concluding that they lacked the *mens rea* necessary for a finding of criminal liability.

3. Whether the sufficiency of evidence to support guilt should be reviewed under the *strictissimi juris* standard in a case in which (1) a defendant was charged with conspiratorial and accessorial liability for another person's "unauthorized" removal of property, (2) the evidence established that the defendant joined with the other person in a lawful effort, within the protection of the First Amendment, to gather information about a matter of national concern and report it to the public, and (3) there was no direct evidence that the defendant understood that the other person would use unlawful means to accomplish their lawful object.

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Point One

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No.
In the
SUPREME COURT of the UNITED STATES

ELIZABETH SANDERS and JAMES SANDERS,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Elizabeth Sanders and James Sanders respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on May 4, 2000.

Opinions Below

The opinion of the Court of Appeals, *United States v. Sanders*, 211 F.3d 711 (2d Cir. 2000), appears as Appendix A to this petition. That court's order, entered July 21, 2000, denying a petition for rehearing is not yet reported and appears as Appendix B. The district court's opinion, *United States v. Sanders*, 17 F.Supp.2d 141 (E.D.N.Y. 1998), concerning a pretrial motion for discovery, appears as Appendix C, and its unreported, oral ruling concerning a pretrial motion to dismiss appears as Appendix D. The court's ruling on petitioners' charge requests appears as Appendix E.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on May 4, 2000. The Court of Appeals denied a timely petition for rehearing by an order entered on July 21, 2000. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitutional And Statutory Provisions Involved

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fifth Amendment to the United States Constitution provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

United States Code, Title 49, Section 1155, provides:

> (b) Criminal penalty--A person that knowingly and without authority removes, conceals, or withholds a part of a civil aircraft involved in an accident, or property on the aircraft at the time

of the accident, shall be fined under title 18, imprisoned for not more than 10 years, or both.

STATEMENT

I. Background

On July 17, 1996, all 230 passengers and crew members aboard TWA Flight 800 lost their lives in a midair explosion that occurred minutes after the plane's departure for Paris from JFK Airport. In the months that followed, national attention was focused on questions about the cause of this tragedy and on the official investigation headed by the Federal Bureau of Investigation ("FBI") and National Transportation Safety Board ("NTSB"). In connection with that investigation, wreckage recovered from the Atlantic Ocean was transported to a hangar in Calverton, New York, and incorporated into a partial reconstruction of the airplane's fuselage and passenger compartment.

II. The Government's Threat to Prosecute Both a Journalist and his Wife in an Effort to Coerce Disclosure of a Confidential News Source

On March 10, 1997, the Riverside, California *Press-Enterprise* published a front-page article reporting that James Sanders, identified in the newspaper as an "author and investigative reporter," had reviewed evidence suggesting that Flight 800 was struck by a missile. The article revealed that Mr. Sanders, through a confidential source, had obtained a tiny sample of material from a section of the passenger cabin in which a trail of red residue appeared, and that chemical analysis

of the residue was consistent with the presence of solid rocket fuel. The article, which also quoted Mr. Sanders' critical comments about the FBI/NTSB investigation, disclosed that his wife was a TWA employee.

Within hours after the publication of the article, the FBI sought to question Elizabeth Sanders, but she declined to be interviewed. In what it has since acknowledged was a violation of the Justice Department's media guidelines (28 C.F.R. § 50.10), the United States Attorney for the Eastern District of New York issued grand jury subpoenas to obtain Mr. Sanders' telephone toll records, without obtaining prior authorization of the United States Attorney General, or complying with other procedures for seeking information from reporters.

On March 13, 1997, an attorney advised the United States Attorney's office that he represented Mr. and Mrs. Sanders and would accept communications or service of process on their behalf. A prosecutor told the attorney that the government wanted to know the identity of Mr. Sanders' source within the official investigation, and offered to enter into a non-prosecution agreement with him in exchange for such disclosure. Through counsel, Mr. Sanders declined the offer, asserting that he did not believe he had committed any crime, and that, as a journalist, he believed he had a right and an obligation to maintain the confidentiality of his source.

Prosecutors subsequently requested a face-to-face meeting at which they warned Mr. Sanders that, if he did not agree to disclose his source, he would not be subpoenaed to appear before the grand jury, but would find himself "on the wrong side of an indictment." During the same meeting, in the wake of Mr. Sanders' continued refusal to betray his source, the prosecutors announced that his wife, Elizabeth Sanders, would also be treated as a target of the government's investigation and that,

unless Mr. Sanders' news source was revealed, the government would attempt to obtain an indictment against her as well. The government has never identified any information it possessed at that time that formed a basis for believing that Mrs. Sanders had committed a crime or should be the object of a criminal investigation. Mr. Sanders reiterated that he had a "constitutional imperative" to protect his source. Through counsel, Mrs. Sanders also declined to cooperate to avoid the threat of prosecution.

III. The Prosecution and Trial Following Refusal to Disclose the Source

Mr. Sanders' book, *The Downing of TWA Flight 800*, which detailed the grounds for his conclusion that a missile was responsible for the fatal explosion and that government officials had concealed this information from the American public, was published in April, 1997. In June, apparently based on telephone records that were subpoenaed in violation of Department of Justice Guidelines, the government located Mr. Sanders' confidential source, TWA pilot Capt. Terrell Stacey, and secured his cooperation against the Sanders pursuant to an agreement that permitted him to plead guilty to a misdemeanor. Subsequently, amid news reports in which the FBI described the Sanders' offense as a "plot to rewrite the history of TWA 800," Mr. and Mrs. Sanders were charged, under a rarely-invoked "aviation penalties" statute [49 U.S.C. § 1155(b)], with aiding and conspiring in Stacey's unauthorized removal of property that had been on an aircraft involved in an accident.

At trial, Capt. Stacey, who had been assigned to participate in the official investigation because of his expertise as TWA's senior 747 pilot, described the emotional impact the Flight 800 tragedy had on the families of the victims and the co-workers of the lost TWA crew members. Stacey himself had

flown the plane involved in the accident from Paris the day before the crash, and had assigned the crew that manned the fatal flight. In the fall of 1996, Mrs. Sanders, whom Stacey had met when she served as a flight safety instructor at JFK Airport, called to ask if he would speak to her husband "so they can find out exactly what happened to Flight 800 and get it before the American public."

Prior to speaking to Mrs. Sanders, Stacey had grown frustrated with the progress of the investigation, which was hampered by tensions and a lack of communication between the FBI and the NTSB. Although initially reluctant to speak to a journalist, Stacey was familiar with Mr. Sanders' previous work as an investigative reporter and believed the search for truth would benefit from Mr. Sanders' independent, investigative techniques. Assured that their communications would remain confidential, Stacey met with Mr. Sanders four times and spoke to him regularly by telephone.

In one of those conversations, Stacey described a reddish substance that appeared in a section of the reconstructed plane's interior. Stacey, who knew that the FBI had taken numerous samples from that area to be tested and that ample additional material remained, did not believe that his own removal of a small sample would compromise the official investigation in any way. Mr. Sanders indicated, based on his experience as a police investigator, that a "very minute sample" – an amount that could be scraped into an envelope with a pen knife – would be sufficient for analysis at a private laboratory. In early January, after an attempt to obtain a scraping of residue failed, Stacey tore two one-inch by three-inch pieces of residue-bearing material from a seatback, and shipped them to Mr. Sanders.

Elizabeth Sanders did not participate in any of the discussions between Stacey and her husband. Stacey testified that, other than her initial call to him, he received one other

telephone call from Mrs. Sanders, during which the subject of residue was mentioned. Asked to recount that conversation "in as much detail as you can recall," Capt. Stacey testified, "Just the thing that I remember about it is she just indicated to me that it would really be nice to have that sample or we really needed that sample." While Stacey asserted that the call occurred during the two- or three-week period when he was contemplating whether to remove the residue, he acknowledged that he "couldn't recall if it was the beginning of it, the middle or end. I honestly don't know."

Rather than claiming that Mrs. Sanders' call induced him to remove the sample, Stacey testified that he had removed it of his "own volition" because of "frustration with the investigation, the lack of sharing the information by the NTSB and, of course, the FBI" and because he "thought this would be a means of me obtaining some more information, more analysis to find out the cause of the accident of Flight 800." Although Stacey responded to a prosecutor's leading questions on re-direct examination by stating generally that he "received influence" from Mr. and Mrs. Sanders, he acknowledged that this assertion did not refer to the conversation in which Mrs. Sanders referred to the residue.

At the conclusion of the trial, the defense urged the district court to permit the jury to consider their contention that, because they sought only a minuscule scraping of residue that was of inconsequential value and that represented an insignificant quantity of the material available for testing, they did not act with the "wrongful intent" necessary for a criminal conviction. In a ruling that was subsequently affirmed on appeal, *Sanders*, 211 F.3d at 723 (Appendix A, pp. 20a-21a), the district court rejected those requests. *See* Appendix E and Appendix F.

Following their convictions, the district court observed that "Mr. and Mrs. Sanders were truthfully determined to find out the cause of this tragedy" and that they had been motivated by "well-intentioned purposes." They were both sentenced to terms of probation, which have been stayed pending adjudication of the present petition.

IV. The Courts' Rulings on the Issue of Vindictive Prosecution

In motions before the district court following their indictment, the Sanders contended that their prosecution reflected an impermissible intention to penalize them for the exercise of rights protected under the First Amendment, and to chill the exercise of those rights. Concluding that the defense had failed to establish that the prosecution harbored "genuine animus" toward the content of their speech, and that the government's threat to indict the defendants as a consequence of their refusal to cooperate in the investigation could not support a claim of vindictive prosecution, the district court denied both a preliminary motion to compel additional discovery related to such a claim, *United States v. Sanders*, 17 F. Supp.2d 141 (E.D.N.Y. 1998) (Appendix C), and a motion for dismissal on that ground. (Appendix D). The Second Circuit Court of Appeals upheld those rulings. With respect to the contention that the prosecution served as an improper means of retaliating against the Sanders because they would not compromise Mr. Sanders' exercise of First Amendment rights by betraying his confidential source, the Court wrote:

> A presumption of vindictiveness is also not warranted merely because a threat to prosecute was carried out after the defendants refused to divulge their source. It is precisely the responsibility of the prosecutor to weigh "the

> societal interest in prosecution" against the potential benefits from a defendant's cooperation. *See id.* at 382, 102 S.Ct. 2485; *see also Bordenkircher*, 434 U.S. at 362, 98 S.Ct. 663 (finding no vindictiveness in "the give-and-take negotiation common in plea bargaining between the prosecution and defense" (internal quotation marks omitted)). That is why, for the most part, no presumption of vindictiveness is appropriate in a pretrial setting. *See United States v. Hinton*, 703 F.2d 672, 678-79 (2d Cir.1983).

211 F.3d at 719 (Appendix A, p. 12).

REASONS FOR GRANTING THE WRIT

Point One

Review of the Second Circuit's judgment will enable this Court to clarify the constitutional limits on the government's discretion to use an unwarranted threat to prosecute a family member as a means of coercing a journalist to disclose a confidential source; such review will resolve questions under the due process clause and the First Amendment that have profound and wide-ranging impact on exercises of prosecutorial power and on freedom of the press and the public's right to be informed.

When investigative reporter James Sanders, adhering to principles rooted in the First Amendment, declined to identify his source within the official Flight 800 investigation in exchange for his own immunity from prosecution, federal prosecutors attempted to induce disclosure through a more potent means. They threatened to seek an indictment not only against Mr. Sanders (who had publicly acknowledged receiving material recovered from Flight 800), but against his wife as well. At the time they issued that threat, however, the prosecutors had no information suggesting that Elizabeth Sanders was connected to the unauthorized removal of the material tested by her husband, or to any other criminal activity. On the contrary, when prosecutors met with James Sanders in April of 1997, the only information they had about Mrs. Sanders was that she was his wife, that she was a TWA employee, and that she had declined to communicate with government agents other than through counsel.

A. Review will enable the Court to articulate the standard of good faith necessary for a prosecutor's threats to fall within the scope of *Bordenkircher v. Hayes*.

Despite the undisputed absence of grounds for believing that Elizabeth Sanders was implicated in a crime, the Second Circuit concluded that the government's threat to seek her indictment fell under the umbrella of *Bordenkircher v. Hayes*, 434 U.S. 357, 362 (1978), in which this Court held that a constitutional due process violation does not arise when a prosecutor threatens to bring charges in the context of the "give-and-take negotiation common in plea bargaining between the prosecution and defense." *See United States v. Sanders*, 211 F.3d at 719 (Appendix A, p. 12a). To reach that conclusion, the Court of Appeals glanced past the government's inability to articulate any justification at the time of the threat for treating Mrs. Sanders as an investigative target. The Second Circuit's reliance on *Bordenkircher* under the circumstances present here demonstrates the need for this Court to expound a principle that was implicit in that case: that prosecutorial threats comport with the Constitutional requirement of due process only when they are made in good faith.

Bordenkircher addressed a situation in which the prosecutor's conduct consisted of "no more than openly present[ing] the defendant with the unpleasant alternatives of forgoing trial or facing charges *on which he was plainly subject to prosecution*." 434 U.S. at 365 (emphasis added). While the requirement of prosecutorial good faith is implicit in *Bordenkircher*, it was unnecessary for the Court to consider the implications of a case such as the present one, in which a threat to prosecute was issued against a person who, at the time, was not "plainly subject to prosecution."

This case presents a further issue as to which *Bordenkircher* expressly reserved judgment: "the constitutional implications of a prosecutor's offer during plea bargaining of adverse or lenient treatment for some person *other* than the accused." 434 U.S. at 364, n. 8 (emphasis in original). In contrast to the Second Circuit's approach in the present case, other Circuits confronting prosecutorial offers involving "lenience" to family members or other third parties have emphasized that the practice is constitutional only when the threat of prosecution is made in good faith. Thus, for example, in *United States v. Pollard*, 959 F.2d 1011, 1020 (D.C. Cir. 1992)(emphasis added), the Court held that:

> The appropriate dividing line between acceptable and unconstitutional plea wiring does not depend upon the physical condition or personal circumstances of the defendant; rather, it depends upon the conduct of the government. Where, as here, the government had probable cause to arrest and prosecute both defendants in a related crime, *and there is no suggestion that the government conducted itself in bad faith* in an effort to generate additional leverage over the defendant, we think a wired plea is constitutional.

See also Miles v. Dorsey, 61 F.3d 1459, 1468 (10th Cir.1995) (requiring "good faith" ability to prosecute third party); *Politte v. United States*, 852 F.2d 924, 930 (7th Cir.1988) (emphasizing "good faith prosecution"); *Harman v. Mohn*, 683 F.2d 834, 837 (4th Cir.1982) (probable cause and good faith); *United States v. Nuckols*, 606 F.2d 566, 569 (5th Cir.1979) (same).

Indeed, some courts have held prosecutors to a heightened standard of good faith under analogous

circumstances. *See United States v. Wright*, 43 F.3d 491, 498 (10th Cir.1994) ("[B]ecause such bargaining 'can pose a danger of coercion' and 'increase the leverage possessed by prosecutors,' the government must abide by 'a high standard of good faith' in its use of such tactics") (quoting *Mosier v. Murphy*, 790 F.2d 62, 66 (10th Cir.), *cert. denied*, 479 U.S. 988(1986). In *Martin v. Kemp*, 760 F.2d 1244, 1247-48 (11th Cir.1985), the Eleventh Circuit held that the determination whether the government observed a "high standard of good faith" turned on a showing that "at the moment that [the prosecutor] made the threats against Martin's wife, 'the facts and circumstances within [the prosecutor's] knowledge and of which [the prosecutor] had reasonably trustworthy information were . . . sufficient to warrant a prudent man in believing that [Martin's wife] had committed . . . an offense" (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)).

The Second Circuit's failure to consider the prosecutors' lack of a good faith basis for prosecuting (or even investigating) Elizabeth Sanders at the time of their threat flies in the face of these holdings, and points to the need for this Court to articulate a clear standard for determining when such threats exceed a prosecutor's constitutional prerogatives. As Justice Robert Jackson observed when he was Attorney General (in a speech quoted in Justice Scalia's dissent in *Morrison v. Olson*, 487 U.S. 654, 728 (1988)), the "most dangerous power of the prosecutor" lies in the possibility:

> that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the

> commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm--in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies.

R. Jackson, *The Federal Prosecutor*, Address Delivered at the Second Annual Conference of United States Attorneys, April 1, 1940.

The present case illustrates the danger Justice Jackson warned of, since it is clear that Elizabeth Sanders was "picked" not because hers was a case that needed to be prosecuted, but because threatening to disrupt her life with a criminal indictment served as an expedient means of coercing her husband to disclose information sought by the government. The constitutional implications of the government's conduct are not diminished by its subsequent ability (through exploitation of a subpoena issued in violation of 28 C.F.R. §50.10, and an agreement to reduce charges against the principle perpetrator of the alleged offense) to follow through on its threat. Even assuming the correctness of the Second Circuit's holding that the paltry evidence introduced to establish the elements of the obscure aviation statute on which Mrs. Sanders was ultimately prosecuted satisfied the standard of "legal sufficiency," that later-acquired evidence does not legitimize the government's

initial, bad-faith determination to target her for prosecution.[1]

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[1]We contend, however, that the evidence adduced at trial was not legally sufficient to establish Elizabeth Sanders' guilt. If certiorari is granted, we will urge the Court to conclude that the sufficiency issue should have been reviewed under the heightened standard of *strictissimi juris*. As this Court recognized in *Noto v. United States*, 367 U.S. 290, 298-300 (1961), that standard is applied to ensure that a person who joins with others to accomplish a lawful and constitutionally-protected purpose, but does not specifically intend to accomplish that purpose by unlawful means, will not be punished when others use unlawful means to further their joint goal. *See United States v. Dellinger*, 472 F.2d 340, 392 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973) (*stricissimi juris* applies when "the group activity out of which the alleged offense develops can be described as a bifarious undertaking, involving both legal and illegal purposes and conduct, and is within the shadow of the first amendment").

The evidence here established that Elizabeth Sanders joined with Capt. Stacey in a lawful effort to "find out exactly what happened to Flight 800 and get it before the American public." There was no evidence that Stacey ever told Mrs. Sanders that he intended to pursue that lawful goal, which was "within the shadow of the first amendment," by any means that exceeded his authority as a participant in the official investigation. Indeed, Stacey himself testified that he did not believe his removal of the residue samples was unlawful. We submit that, under any standard, the evidence was insufficient to establish Mrs. Sanders' knowledge that Stacey would act in an "unauthorized" manner, and that it certainly failed to satisfy the *strictissimi juris* standard of assuring that she was not punished for her advocacy of a constitutionally-protected goal.

B. Review will enable the Court to set necessary limits on prosecutorial conduct that impairs the constitutionally-protected ability to gather and report news.

While a prosecutor's unwarranted threat to indict a family member in an effort to coerce an individual to bow to its demands would warrant this Court's review under any circumstances, the abuse of prosecutorial power in the present case should be of particular concern because it was at the expense of the constitutionally-protected right to gather and report news. Even though this Court has declined to carve out special privileges for reporters, it has recognized that "without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972). *See New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (concurring opinion)("The press was protected so that it could bare the secrets of government and inform the people"). It has long been understood that maintaining confidential relationships with "inside" sources who are willing to come forward only if they are shielded from the ramifications of disclosure is critical to the ability of journalists to gather news. *See*, e.g. *Branzburg*, 408 U.S. at 729-30 (dissenting opinion of Stewart, J.) ("An officeholder may fear his superior; a member of the bureaucracy, his associates; a dissident, the scorn of majority opinion. All may have information valuable to the public discourse, yet each may be willing to relate that information only in confidence to a reporter whom he trusts, either because of excessive caution or because of a reasonable fear of reprisals or censure for unorthodox views"). Indeed, in the context of court-ordered discovery, the Second Circuit has observed that:

> Compelled disclosure of confidential sources unquestionably threatens a journalist's ability to secure information that is made available to him only on a confidential basis . . . . The deterrent effect such disclosure is likely to have upon future "undercover" investigative reporting . . . threatens freedom of the press and the public's need to be informed.

Baker v. F. & F. Inv., 470 F.2d 778, 782 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973).

A grant of certiorari in the present case will enable this Court to give practical effect to *Branzburg*'s assurance that the gathering of news is protected under the First Amendment. In declining to require a special showing before reporters could be compelled to provide information to a grand jury, the *Branzburg* majority noted that "the Attorney General has already fashioned a set of rules for federal officials in connection with subpoenaing members of the press to testify before grand juries or at criminal trials," and that these provisions "may prove wholly sufficient to resolve the bulk of disagreements and controversies between press and federal officials." 408 U.S. at 706-07 (footnote omitted). The majority opinion went on to explain that:

> . . . news gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment. Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification. Grand juries are subject to judicial control and subpoenas to

> motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth.

408 U.S. at 707-08 (footnote omitted). Justice Powell's concurrence expanded on the majority's announcement that "no harassment of newsmen will be tolerated," and emphasized that a reporter "will have access to the court on a motion to quash and an appropriate protective order may be entered." 408 U.S. at 709-10.

The strategy adopted by the government in the present case demonstrates how prosecutors can circumnavigate the safeguards contemplated in *Branzburg*. By choosing not to seek information from Mr. Sanders by means of a grand jury subpoena, they avoided any obligation to comply with the Department of Justice's current news media policy (28 C.F.R. § 50.10.), which is a later version of the "Guidelines for Subpoenas to the News Media" cited with approval in *Branzburg*. 408 U.S. at 706-07, n. 41.[2] By utilizing a unilateral executive branch mechanism – the threat of prosecution – the government also placed its effort to obtain information about a journalists' confidential source beyond the reach of the "judicial control" [*Branzburg*, 408 U.S. at 708] to which it would have been subject in the context of a grand jury proceeding.

The government's ability to negate the protections envisioned in *Branzburg* sends a chilling message to reporters and their potential sources. In view of this Court's longstanding

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[2]Additionally, as the government ultimately conceded, it disregarded that policy by issuing subpoenas for Mr. Sanders' telephone toll records without complying with the applicable provisions of CFR § 50.10.

recognition that journalists are "the means by which the people receive that free flow of information and ideas essential to intelligent self-government" and that "[t]he underlying right is the right of the public generally," *Saxbe v. Washington Post Co.*, 417 U.S. 843, 863-64 (1974) (Powell, J., dissenting), it falls to this Court to counteract that chilling message by demonstrating that there are meaningful limits to a prosecutor's ability to utilize the powers of his office to intimidate a reporter who stands by his promise of confidentiality to a source. Granting certiorari in the present case will provide an opportunity for the Court to promote the vital functioning of a free press by firmly declaring that the Constitution cannot tolerate government officials' use of unfounded threats against journalists' family members as a means of forcing them to abandon the principles that are essential to their ability to gather information and report it to the public.[3]

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[3] Although this issue primarily concerns the unconstitutional purpose underlying the selection of Elizabeth Sanders for prosecution, the baseless threat to prosecute her is pertinent to the showing of vindictiveness as to both petitioners. Together with other factors discussed in the opinions below, including its blatant disregard of its own rules concerning subpoenas to journalists, the government's willingness to use James Sanders' wife as a bargaining chip is relevant to the question whether a "realistic likelihood" of "genuine animus" against Mr. Sanders was established. Furthermore, since a preliminary determination that the defendants had provided "some evidence" tending to establish the essential elements of a vindictive prosecution claim would have entitled them to additional discovery concerning the government's charging decision, *see Sanders*, 211 F.3d at 717, citing *United States v. Armstrong*, 517 U.S. 456, 468 (1996), a reversal on that issue as to Elizabeth Sanders should, at a minimum, provide a basis for vacating James Sanders' conviction to permit further litigation of his own vindictive prosecution claim in the light of such discovery.

Point Two

Review of this case will permit the Court to provide guidance concerning the circumstances in which a criminal defendant, under the principles announced in *Morissette v. United States*, should be permitted to argue absence of wrongful intent as a bar to conviction.

The conduct charged in the present indictment consisted of an investigative journalist's effort, with the assistance of his wife, to obtain a minuscule scraping of residue that had no value apart from the information it might contain about the cause of the Flight 800 tragedy. The residue was removed by a senior pilot assigned to the official governmental investigation, who knew that the FBI had previously taken a number of samples of the residue to be analyzed and that ample quantities of the residue remained for further testing. Relying principally on this Court's seminal decision in *Morissette v. United States*, 342 U.S. 246 (1952), the defense unsuccessfully urged the district court to permit the jury to consider these circumstances as a basis for finding that the defendants lacked the *mens rea* essential to a finding of criminal culpability. *See* Appendix E and Appendix F (Charge requests and district court's ruling).

In *Morissette*, this Court explained the critical role of scienter in criminal jurisprudence:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment

> for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a "vicious will."

342 U.S. at 250-51 (footnotes omitted). Over the decades since *Morissette* was decided, this Court has applied its principles in a line of cases "interpreting criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70 (1994). *See,* e.g., *Staples v. United States*, 511 U.S. 600, 614 (1994) (construing the *mens rea* requirement in a manner that avoids the potential of imposing criminal sanctions on individuals whose "mental state . . . makes their actions entirely innocent").

Review of the present case will provide an opportunity for the Court to breathe new life into the principles announced in *Morissette* by demonstrating that they define a minimal level of wrongful intent that must be present before an individual may be branded a felon. It will permit the Court to consider whether, in keeping with those principles, a defendant should be permitted to point to particular factors in his case that demonstrate a lack of culpable intent. This case offers an apt setting for elucidating those principles because, in critical respects, the circumstances of the present case mirror those of *Morissette*.

The defendant in *Morissette* was a scrap collector who removed three tons of apparently discarded shell casings from land used as a federal bombing practice range. At his trial on charges of theft and conversion, he was prevented from arguing that, while he knew the shell casings were on government property and that he did not have permission to remove them, he had acted with innocent intent because he believed they were abandoned and of no value. The trial court, however, relying strictly on the wording of the statute, instructed the jury that a guilty verdict required only a finding that Morissette intended to take the property.

Reversing Morissette's conviction, this Court concluded that the concession that his unauthorized removal of property from posted government property was a conscious and intentional act did not obviate the need to establish that he acted "wrongfully." 342 U.S. at 276. In requiring such proof, the Court looked beyond the literal wording of the statute, which did not expressly include an element of "wrongful" intent. It held that, if the jury concluded that the property appeared to be "unwanted and abandoned junk" and that the defendant's testimony and other surrounding circumstances – including the candor with which he admitted the charged conduct – established a "lack of any conscious deprivation of property or intentional injury," guilt would not have been established. 342 U.S. at 275-76.

The instructions in the present case permitted a finding of guilt based on a *mens rea* standard that was virtually identical to the one that this Court deemed inadequate in *Morissette*. Those instructions provided that a conviction under 49 U.S.C. § 1155(b) could be based solely on proof that a person "knowingly and intentionally" removed property that was on a civil aircraft involved in an accident, and that the person "knew"

that he did not have authority to do so. Just as in *Morissette*, a reasonable view of the evidence in the present case would support the defendants' contention that, even if the unauthorized removal was knowing and intentional, it occurred under circumstances that evinced a "lack of any conscious deprivation of property or intentional injury." 342 U.S. at 276.

The Second Circuit ignored those circumstances. In support of its conclusion that § 1155(b)'s knowledge element is sufficient to establish criminal culpability, it posited that "'one would hardly be surprised to learn'" that the unauthorized removal of parts or property from a crash site "'is not an innocent act.'" *Sanders*, 211 F.3d at 723. (Appendix A, p. 21a)(quoting *United States v. Figueroa*, 165 F.3d 111, 116 (2d Cir. 1998), and *United States v. Freed*, 401 U.S. 601, 609 (1971). Of course, a similar generalization could have been made with regard to removal of property from the bombing range in *Morissette*, which the defendant admitted he knew was federal land. The teaching of *Morissette*, however, is that a defendant facing criminal charges should be permitted to point to unique circumstances that render such generalized assumptions of culpability inapplicable in his particular case. Because the courts below ignored that teaching, they foreclosed any opportunity for the jury considering the Sanders' criminal liability to take into account the fact that the "property" they sought consisted of nothing more than a minuscule scraping of residue and that it was removed by a high-level participant in the official investigation who knew that the FBI had already removed samples for testing and that large quantities of further samples remained available.

The lower courts' failure to permit the jury to consider those factors points to a need for this Court to re-affirm the principles announced nearly a half-century ago in *Morissette*. By granting a writ of certiorari, this Court can provide

meaningful guidance regarding the fundamental nature of criminal *mens rea*, and prevent the subversion of justice that occurs when the stigma of criminality is attached to individuals whose intentions were innocent.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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October, 2000

No. 00-

In The

Supreme Court of the United States

October Term, 2000

—♦—

ELIZABETH SANDERS and JAMES SANDERS,

Petitioners,

– against –

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Second Circuit

APPENDIX

SW

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[Appendix A - Opinion of the United States Court of Appeals for the Second Circuit (Affirming Judgment of Conviction), May 4, 2000 Pages 1a – 21a]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1999

(Argued February 9, 2000 Decided May 4, 2000)

Docket Nos. 99-1430, 99-1431

UNITED STATES OF AMERICA,

Appellee,

—v.—

ELIZABETH SANDERS; JAMES SANDERS,

Defendants-Appellants.

Before:

MESKILL and SOTOMAYOR, *Circuit Judges*, and KEENAN,* *District Judge*.

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* Honorable John F. Keenan, United States District Judge for the Southern District of New York, sitting by designation.

Appeal from a judgment entered by the United States District Court for the Eastern District of New York, Seybert, *J.*, on a verdict convicting appellants of conspiring to remove, without authority, parts or property from a civil aircraft involved in an accident and of aiding and abetting the same.

Affirmed.

J. BRUCE MAFFEO, New York City, *for Appellant James Sanders.*

JEREMY GUTMAN, New York City, *for Appellant Elizabeth Sanders.*

DAVID PITOFSKY, Assistant United States Attorney, Eastern District of New York, Brooklyn, NY (Loretta E. Lynch, United States Attorney, Emily Berger, Assistant United States Attorney, Eastern District of New York, Brooklyn, NY, of counsel), *for Appellee.*

MESKILL, *Circuit Judge*:

Defendants-appellants James and Elizabeth Sanders were convicted by a jury in the United States District Court for the Eastern District of New York, Seybert, *J.*, of conspiring to remove, without authority, parts or property from a civil aircraft that has been involved in an accident and of aiding and abetting the same. On appeal, they present five arguments: (1) the prosecution was vindictive, (2) the prosecution impermissibly burdened a First Amendment right to protect the confidentiality of a news source, (3) the material removed was *de minimis*, (4) the evidence was insufficient to support the verdict against Elizabeth Sanders, especially viewed

strictissimi juris, and (5) the jury should have been instructed to acquit absent a finding of "wrongful intent." Finding no merit to these arguments, we affirm.

BACKGROUND

On July 17, 1996 TWA Flight 800 exploded over the Atlantic Ocean shortly after takeoff, killing all 230 persons on board. The government undertook a massive salvage effort to recover as much of the wreckage as possible, in an attempt to determine the cause of the disaster. The wreckage was transported to a secured facility in Calverton, NY, where it was identified, if possible, catalogued and stored. Numerous government agencies were involved in the investigation, including the Federal Bureau of Investigation (FBI) and the National Transportation Safety Board (NTSB).

While the official investigation was proceeding, there was considerable speculation in the media and the public as to the cause of the disaster. Numerous explanations were put forward, including a theory that the plane had been struck by a missile. *See, e.g.*, Asra Q. Nomani, *et al.*, "Airlines: After the Crash, More Questions Than Answers," Wall St. J., July 19, 1996, at B1. James Sanders, an investigative journalist, decided to investigate the incident. Through his wife Elizabeth, a senior TWA flight attendant, he made contact with Capt. Terrell Stacey, TWA's senior 747 pilot and a participant in the official investigation.

According to Capt. Stacey's testimony at trial, he received a phone call from Mrs. Sanders sometime in the fall of 1996. She suggested that he meet with Mr. Sanders, who might be able to help "find out exactly what happened to Flight 800 and get it before the American public." After some initial reluctance, Capt. Stacey agreed to meet in confidence with Mr. Sanders. Capt. Stacey and Mr. Sanders met four times

between November 1996 and February 1997. They spoke regularly by telephone.

During one of their phone conversations, Capt. Stacey described a reddish residue that had been found on some of the seats recovered from the wreckage. Mr. Sanders stated that "if it came out positive for explosive residue, then it would [be a] 'slam dunk' as far as being absolute proof that some outside force affected the airplane." Mr. Sanders asked Capt. Stacey to obtain a sample of the residue for testing by a private laboratory. Capt. Stacey demurred. He explained that "we had been warned many times to maintain [the] confidentiality of the investigation and we knew we weren't supposed to take anything out of the [Calverton facility]." Over the next few weeks Mr. Sanders made a number of attempts to contact Capt. Stacey, who had not yet decided whether or not to take the sample. At one point, Mrs. Sanders called Capt. Stacey, urging him to take the sample. Capt. Stacey ultimately did so, removing several strips of styrofoam, measuring approximately 1" x 3", from the back of two seats. The parties disagree as to whether Capt. Stacey removed the samples before or after receiving Mrs. Sanders' call.

On March 10, 1997, a front-page article in the Riverside, California *Press-Enterprise* reported on Mr. Sanders' investigation and his theory that Flight 800 had been struck by a United States Navy missile. The article identified Mr. Sanders as an "author and investigative reporter" and revealed that Mr. Sanders, through a confidential source, had obtained samples of residue from the wreckage that were consistent with the presence of solid rocket fuel. The article also disclosed that Mrs. Sanders was a TWA employee. Mr. Sanders' book, *The Downing of TWA Flight 800*, was published the following month.

Immediately after the publication of the *Press-Enterprise* article, the FBI attempted to question Mrs. Sanders. The United States Attorney for the Eastern District of New York also obtained a grand jury subpoena for Mr. Sanders' telephone records, without obtaining the authorization of the Attorney General or otherwise complying with Department of Justice policy in dealing with members of the media. *See* 28 C.F.R. § 50.10 (1999).

Shortly thereafter, an attorney representing Mr. and Mrs. Sanders contacted Assistant United States Attorney Benton Campbell and offered to accept communications or service of process on their behalf. In response, Mr. Campbell offered to enter into a non-prosecution agreement with Mr. Sanders in exchange for the disclosure of his confidential source. Mr. Sanders declined, expressing his belief that he had not committed any crime and that he was entitled to preserve the confidentiality of his news source. At a subsequent face-to-face meeting, Mr. Campbell, together with then-Chief of the Criminal Division Valerie Caproni, warned Mr. Sanders that he risked indictment if he refused to disclose his source and that Mrs. Sanders was also a target of the investigation and could be indicted as well.

In June 1997, the government identified Capt. Stacey as Mr. Sanders' source and secured his cooperation against Mr. and Mrs. Sanders by allowing him to plead guilty to a misdemeanor. An arrest warrant for Mr. and Mrs. Sanders issued in December 1997, charging them with violating 49 U.S.C. § 1155(b). Section 1155(b) prohibits the unauthorized removal, concealment, or withholding of "a part of a civil aircraft involved in an accident, or property on the aircraft at the time of the accident." The defendants moved to obtain discovery on claims of selective and vindictive prosecution. The district court denied the motions. *United States* v. *Sanders*, 17 F.Supp.2d 141 (E.D.N.Y. 1998). The defendants

then moved to dismiss the indictment, contending that they were the victims of selective and vindictive prosecution and that the information sought by the government was protected by the First Amendment. The district court denied those motions as well. The defendants were subsequently convicted by a jury. Mr. Sanders was sentenced to three years probation, with a special condition that he perform 50 hours of community service. Mrs. Sanders was sentenced to one year of probation, with a special condition that she perform 25 hours of community service. A special assessment of $200 was imposed on both defendants. Both sentences were stayed pending this appeal.

DISCUSSION

I. *Vindictive Prosecution*

The defendants first contend that their convictions should be dismissed because they were the victims of vindictive prosecution. In particular, they claim that they were prosecuted (1) to punish them for challenging the government's explanation of the disaster, and (2) to retaliate for their refusal to disclose their informant. The defendants also argue, if dismissal is not warranted, that the district court erred in denying them discovery on the issue of vindictive prosecution. The Sanders do not pursue the selective prosecution claim on appeal.

As an initial proposition, "the decision as to whether to prosecute generally rests within the broad discretion of the prosecutor," *United States* v. *White*, 972 F.2d 16, 18 (2d Cir. 1992), and a prosecutor's pretrial charging decision is presumed legitimate, *see id.* at 19. However, "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort,"

Bordenkircher v. *Hayes*, 434 U.S. 357, 363 (1978), and a prosecution brought with vindictive motive, " 'penalizing those who choose to exercise' constitutional rights, 'would be patently unconstitutional.' " *North Carolina* v. *Pearce*, 395 U.S. 711, 724 (1969) (quoting *United States* v. *Jackson*, 390 U.S. 570, 581 (1968)). "Accordingly, an indictment will be dismissed if there is a finding of 'actual' vindictiveness, or if there is a presumption of vindictiveness that has not been rebutted by objective evidence justifying the prosecutor's action." *United States* v. *Johnson*, 171 F.3d 139, 140 (2d Cir. 1999) (per curiam).

To establish an actual vindictive motive, a defendant must prove objectively that the prosecutor's charging decision was a "direct and unjustifiable penalty," *United States* v. *Goodwin*, 457 U.S. 368, 384 & n.19 (1982), that resulted "solely from the defendant's exercise of a protected legal right," *id.* at 380 n.11. *See also Johnson*, 171 F.3d at 140-41. Put another way, the defendant must show that "(1) the prosecutor harbored genuine animus toward the defendant, or was prevailed upon to bring the charges by another with animus such that the prosecutor could be considered a 'stalking horse,' and (2) [the defendant] would not have been prosecuted except for the animus." *United States* v. *Koh*, 199 F.3d 632, 640 (2d Cir. 1999) (internal quotation marks omitted).

To establish a presumption of prosecutorial vindictiveness, the defendant must show that "the circumstances of a case pose a 'realistic likelihood' of such vindictiveness." *United States* v. *King*, 126 F.3d 394, 397 (2d Cir. 1997) (quoting *Blackledge* v. *Perry*, 417 U.S. 21, 27 (1974)). The circumstances must present a realistic likelihood of vindictiveness that would be "applicable in all cases," *Goodwin*, 457 U.S. at 381, and any such presumption may be "overcome by objective evidence justifying the prosecutor's action," *id.* at

376 n.8. A presumption of vindictiveness generally does not arise in a pretrial setting. *Koh*, 199 F.3d at 639-40.

We have not previously considered when a defendant is entitled to discovery on a claim of vindictive prosecution. However, to obtain discovery on a claim of selective prosecution, we have held that a defendant must provide "some evidence tending to show the existence of the essential elements of the defense." *United States* v. *Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974) (quoted in *United States* v. *Armstrong*, 517 U.S. 456, 468 (1996)). The standard is a "rigorous" one, *Armstrong*, 517 U.S. at 468, "itself . . . a significant barrier to the litigation of insubstantial claims," *id.* at 464. We see no reason to apply a different standard to obtain discovery on a claim of vindictive prosecution. *Accord United States* v. *Heidecke*, 900 F.2d 1155, 1159 (7th Cir. 1990). Whether a defendant claims selective prosecution or vindictive prosecution, " '[e]xamining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy.' " *Armstrong*, 517 U.S. at 465 (quoting *Wayte* v. *United States*, 470 U.S. 598, 607 (1985)). We review a district court's decision denying discovery on such claims only for abuse of discretion. *United States* v. *Fares*, 978 F.2d 52, 59 (2d Cir. 1992).

We agree with the district court that the defendants failed to establish actual vindictiveness because they failed to offer evidence of any "genuine animus" motivating the prosecution. The evidence offered by the defendants shows, at most, that certain persons and government agencies involved in the Flight 800 investigation disagreed with the defendants' explanation for the disaster. *See Sanders*, 17 F.Supp.2d at 146-50. In no way does the evidence show that the prosecu-

tion was brought to punish the defendants or to retaliate against them for exercising their rights. Consequently, the defendants were properly denied discovery on their vindictive prosecution claim.

The defendants point principally to a press release announcing the criminal charges, to a letter offered by the government at sentencing, and to a hearsay statement recounted on the *NBC Nightly News*. The press release announcing the criminal charges stated, in pertinent part:

> The criminal complaint outlines efforts by JAMES SANDERS to have laboratory tests done on portions of the TWA 800 wreckage which he unlawfully possessed. An individual employed at the laboratory has informed the FBI that SANDERS emphasized his desire for the tests to identify the presence of solid rocket propellant. The tests were conducted and provided no conclusive evidence of the presence of solid rocket fuel. These results were communicated to SANDERS.
>
> According to the criminal complaint, despite the laboratory test results, JAMES SANDERS misrepresented those results in media reports for which he was a source.
>
> Mr. KALLSTROM [then-Assistant Director in Charge of the New York FBI Office] stated, "This criminal investigation is far from over. These defendants are charged with not only committing a serious crime, they have also increased the pain already inflicted on the victims' families. This investigation will continue in an effort to identify any other individuals who may have played a role in this scheme."

The letter submitted by the government at sentencing refers to "the trauma visited upon the bereaved families of those who perished in the crash, whose grief was only exacerbated

and prolonged by Mr. Sanders' dissemination of misinformation."

The defendants argue that these references to the suffering of the victims' families plainly do not refer to the unauthorized removal of small pieces of wreckage, but rather to the defendants' attempts to challenge the official explanation for the disaster. They conclude that the prosecution was brought to punish them for the latter, *i.e.*, for exercising First Amendment rights.

However, the press release and sentencing letter do not say anything about why the prosecution was brought, much less indicate that "genuine animus" motivated the decision to prosecute. It would be too easy for defendants to obtain discovery on vindictive prosecution claims if all that was required was to identify a potential motive for prosecutorial animus. To warrant discovery, the defendant must show "some evidence" of "genuine animus," not the mere possibility that animus might exist under the circumstances.

Furthermore, press releases and sentencing materials regularly provide background information, such as the identity of the victims or the consequences of criminal activity, to better illustrate the nature of the crime. The press release and sentencing letter here did just that, explaining that the residue samples were obtained in an attempt to prove that TWA Flight 800 was struck by a missile. To the extent the defendants' opinions and writings caused pain to the victims' families, such pain was fairly attributable to the defendants' unauthorized removal of part of the wreckage. The recitation of this background information, however, is not evidence that the prosecution was brought because of the defendants' beliefs rather than because they committed the crimes charged. The other evidence cited by the defendants—including the hearsay statement that "more [conspirators] may have

been involved in what [the FBI] calls a plot to rewrite the history of TWA 800," attributed to the FBI by the *NBC Nightly News*—also fails to show that the charges were motivated by "genuine animus."

The defendants argued before the district court that the chronology of events leading up to their indictment was evidence of the government's animus. *See Sanders*, 17 F.Supp.2d at 146-48. They pointed to "three triggering events" that allegedly gave rise to retaliation: the publication of the newspaper article implicitly accusing the FBI and NTSB of concealing evidence, the publication of the book continuing to probe the government's conduct, and Mr. Sanders' requests under the Freedom of Information Act for information about certain U.S. Attorneys and FBI agents. *Id.* at 147-48. Even assuming that the defendants were a thorn in the government's side, it does not follow that they were punished because they may have drawn blood. The fact that an aggressive investigation commenced immediately following publication of the newspaper article provides no evidence of such vindictiveness, inasmuch as the article reported that Mr. Sanders claimed to have obtained "samples of the residue" and "pieces of one of the seats." *See id.* at 149. The article "clearly indicated a potential violation of 49 U.S.C. § 1155(b)," *id.*, so the government's decision to investigate cannot give rise to an inference of impropriety. There is nothing to suggest that the other alleged retaliatory acts were anything more than subsequent steps in the government's investigation into how Mr. Sanders had obtained the samples of residue and seat fabric.

Furthermore, the defendants cannot claim that the circumstances surrounding their case pose a "realistic likelihood" of vindictiveness. Such a presumption is not warranted merely because the government commenced criminal proceedings against somebody who challenged the findings of a

government agency. *See Goodwin*, 457 U.S. at 384 ("[A] mere opportunity for vindictiveness is insufficient to justify the imposition of a prophylactic rule."). More to the point, the government offered the defendants immunity if they would identify their informant, an offer that belies any supposed motive to punish them. In the circumstances of this case, the government's offer of immunity is persuasive evidence that the government was motivated by a legitimate desire to identify and eliminate a patent security breach in the official investigation, rather than by an illegitimate desire to silence an objectionable viewpoint.

A presumption of vindictiveness is also not warranted merely because a threat to prosecute was carried out after the defendants refused to divulge their source. It is precisely the responsibility of the prosecutor to weigh "the societal interest in prosecution" against the potential benefits from a defendant's cooperation. *See id.* at 382; *see also Bordenkircher*, 434 U.S. at 362 (finding no vindictiveness in "the give-and-take negotiation common in plea bargaining between the prosecution and defense" (internal quotation marks omitted)). That is why, for the most part, no presumption of vindictiveness is appropriate in a pretrial setting. *See United States* v. *Hinton*, 703 F.2d 672, 678-79 (2d Cir. 1983).

Absent any evidence that the prosecution was brought to punish the defendants or to retaliate against them for exercising their rights, the defendants were not entitled to discovery on the issue of actual vindictiveness. *A fortiori*, their defense of actual vindictiveness also fails. The defendants have not established that a presumption of vindictiveness is warranted. Therefore, their motion to dismiss on the basis of prosecutorial vindictiveness was properly denied.

II. *Journalist's Privilege*

The defendants next contend that there is a journalist's privilege barring any government coercion to disclose a news source, "absent a concern so compelling as to override the precious rights of freedom of speech and the press." *See Baker* v. *F & F Inv.*, 470 F.2d 778, 785 (2d Cir. 1972). They argue that we should adopt a balancing test weighing "the governmental interest served by prosecution" against "the detrimental impact of permitting such a prosecution to be used as a means of coercing disclosure of a journalist's source."

We decline. The defendants rely on a qualified journalist's privilege against compelled disclosure of confidential news sources that we first recognized in *Baker*. *Baker* (and its progeny) involved the power of a court to supervise its own compulsory discovery processes, whereas the case here involves the power of a prosecutor to decide when and on what terms to bring charges against a defendant. We hold that no journalist's privilege is applicable here.

In *Baker*, class action plaintiffs alleged that the defendants sold homes at excessive prices by engaging in racially discriminatory practices such as "blockbusting." *Id.* at 780. They deposed Alfred Balk, a journalist who had written an article for the *Saturday Evening Post* titled "Confessions of a Block-Buster." The article was based on information supplied by a real estate agent who had asked to remain anonymous. Although Balk was "highly sympathetic" to the plaintiffs' cause, *id.*, he balked when asked to identify the real estate agent, and the plaintiffs moved for an order under Fed. R. Civ. P. 37 compelling an answer, *see id.* at 781. The district court refused to grant the motion, and we affirmed. Recognizing that "[a] motion seeking a discovery ruling is addressed to the discretion of the district court," we deter-

mined that the district court "was well within the ambit of [its] discretionary authority in denying [the] motion for discovery." *Id.* We explained that, "[a]lthough . . . federal law does not recognize an absolute or conditional journalist's testimonial 'privilege,' neither does federal law require disclosure of confidential sources in each and every case, both civil and criminal, in which the issue is raised." *Id.* Instead, "courts . . . must rely on both judicial precedent and a well-informed judgment as to the proper federal public policy to be followed in each case." *Id.* We concluded that the public and private interests in compelled testimony did not outweigh the "paramount public interest in the maintenance of a vigorous, aggressive and independent press," especially because the information sought might have been available from other sources. *See id.* at 782-83.

Following *Baker* our decisions dealing with the journalist's privilege have involved not only motions to compel under Fed. R. Civ. P. 37, but also motions to quash subpoenas issued in both civil and criminal cases. *See United States* v. *Cutler*, 6 F.3d 67, 71 (2d Cir. 1993); *United States* v. *Burke*, 700 F.2d 70, 76-77 (2d Cir. 1983); *In re Petroleum Prods. Antitrust Litig.*, 680 F.2d 5, 7-8 (2d Cir. 1982). Just like motions to compel under Fed. R. Civ. P. 37, motions to quash are entrusted to the sound discretion of the district court. *See Logan* v. *Bennington College Corp.*, 72 F.3d 1017, 1027 (2d Cir. 1995) (civil subpoena); *United States* v. *Caming*, 968 F.2d 232, 238 (2d Cir. 1992) (criminal subpoena); *In re Grand Jury Matters*, 751 F.2d 13, 16 (2d Cir. 1984) ("We review a district court decision to quash, or not quash, a grand jury subpoena, solely for abuse of discretion, with much deference being owed to the lower court's authority."). We find no comparable font of discretionary authority that would permit us to "balance" First Amendment interests here.

To the contrary, it is the prosecutor, not the court, who is vested with authority to decide whether to prosecute or to forgo prosecution in return for cooperation. "In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher*, 434 U.S. at 364. "Judicial deference to the decisions of these executive officers rests in part on an assessment of the relative competence of prosecutors and courts. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake." *Armstrong*, 517 U.S. at 465 (internal quotation marks omitted).

Of course, the prosecutor must act within the bounds of the Constitution. *See id.* at 464. However, the First Amendment erects no absolute bar against government attempts to coerce disclosure of a confidential news source, *Branzburg* v. *Hayes*, 408 U.S. 665, 679-708 (1972), nor does it invalidate "every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability," *id.* at 682. As explained earlier, the defendants have not shown that the prosecution was leveled with actual vindictiveness, in violation of their Due Process rights. To the contrary, the prosecution acted forthrightly in dealing with the defendants in this case, offering them immunity if they would identify the person or persons who violated a federal criminal statute by providing them with the samples of the residue and seat back fabric. We believe the offer was a legitimate exercise of "the broad discretion" entrusted to the prosecutor to weigh "the extent of the societal interest in

prosecution" against the potential benefits of the defendants' cooperation, *see Goodwin*, 457 U.S. at 382, and we hold that no journalist's privilege is applicable here.

III. *Statutory Interpretation*

The defendants next argue that the "minuscule quantity" of residue involved cannot be considered "property" within the meaning of 49 U.S.C. § 1155(b) and that, in the alternative, section 1155(b) did not provide fair warning that the removal of such *de minimis* quantities would be illegal. We reject these arguments out of hand.

Section 1155(b) states:

> A person that knowingly and without authority removes, conceals, or withholds a part of a civil aircraft involved in an accident, or property on the aircraft at the time of the accident, shall be fined under title 18, imprisoned for not more than 10 years, or both.

The statute, on its face, contains no exception permitting the *de minimis* removal, concealment, or withholding of parts or property from an airplane accident. As noted by the government, the recovered wreckage was subject to strict chain of custody procedures, in the event any of it was needed as evidence in a criminal proceeding. The unauthorized removal of even a *de minimis* amount could have seriously jeopardized the integrity of the ongoing investigation.

In any case, even if a *de minimis* exception exists—a question we do not answer today—it would not extend to the removal of parts or property that could be relevant to determining the cause of the crash. To hold otherwise would defeat the purpose of section 1155(b), which is to deter the thoughtless and occasionally malicious removal of aircraft wreckage "vital to the accident investigation." *See* H.R. Rep. No. 87-2487 (1962). Capt. Stacey testified that, according to

Mr. Sanders, the residue might provide "slam dunk . . . absolute proof that some outside force affected the airplane." The fact that defendants obtained the samples in an effort to prove the cause of the crash clearly establishes that the material taken was the type of "property" covered by the statute.

The defendants also argue that section 1155(b) did not provide "fair warning" that the removal of such small quantities of material would be illegal. The "touchstone" as to whether a statute provides fair warning "is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *United States* v. *Lanier*, 520 U.S. 259, 267 (1997). We believe that section 1155(b), standing alone, is "reasonably clear" in prohibiting the defendants' conduct. A statute is not rendered vague or ambiguous simply because a defendant might speculate that an exception exists, when nothing in the statute suggests such an exception.

IV. *Evidentiary Sufficiency*

Next, Mrs. Sanders claims that the evidence was insufficient to support her conviction, especially viewed *strictissimi juris*. The crux of her argument is based on one view of the evidence. According to Mrs. Sanders, the phone call she made to Capt. Stacey urging him to obtain samples of the residue was made only after he had already taken the samples, notwithstanding his testimony that (1) the call was made while he was deciding whether or not to take the samples, and (2) he was influenced in his decision to take the samples by both Mr. and Mrs. Sanders. To support her argument, Mrs. Sanders relies on a series of inferences to establish when the phone call was made and when Capt. Stacey obtained the samples.[1] Mrs. Sanders contends that the gov-

[1] Mrs. Sanders points out that Capt. Stacey was unsure exactly when the call occurred, but that he recalled only one instance when Mrs. Sanders had

ernment therefore proved neither the aiding and abetting charge, because it has not shown that her efforts contributed to the success of the crime, *see United States* v. *Labat*, 905 F.2d 18, 23 (2d Cir. 1990), nor the conspiracy charge, because it has not shown that she had entered into an agreement to commit the crime, *see United States* v. *Wardy*, 777 F.2d 101, 107-08 (2d Cir. 1985).

When challenging a conviction for insufficient evidence, the defendant bears a "heavy burden." *United States* v.

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called him (aside from the initial call suggesting that he meet with Mr. Sanders). Phone company records showed only two calls from Mrs. Sanders' residence to the Holiday Inn where Capt. Stacey was staying: a two minute call on January 8, and a twenty minute call the evening of January 9, 1997. Mrs. Sanders posits that the two minute call on January 8 reached only the Holiday Inn switchboard, so the twenty minute call on January 9 must have been the phone call urging Capt. Stacey to take the samples. Mrs. Sanders next argues that Capt. Stacey obtained the samples during the day January 9, *i.e.*, before her phone call that evening. Records from the Calverton facility showed that Capt. Stacey left at 4:30 p.m. on January 9. Capt. Stacey testified that he called Mr. Sanders to inform him that he had taken the sample, and Capt. Stacey's phone records showed only one phone call to Mr. Sanders during the relevant time period—on January 9, after receiving Mrs. Sanders' phone call. Furthermore, a January 10 email from Mr. Sanders supposedly confirms that Capt. Stacey sent the samples on or before January 9, because Mr. Sanders stated that he had the samples, which were sent by Federal Express.

Even if Mrs. Sanders' reconstruction of the events is accurate, the January 8 phone call would be enough to sustain her conviction. A reasonable jury could readily conclude that the January 8 phone call was made to persuade Capt. Stacey to take the samples. The phone call would thus show not only that she conspired to commit the crime, but also that her "efforts contributed to its success." *Labat*, 905 F.2d at 23. The requirement that one who aids and abets a crime must contribute to its success should not be understood too literally, inasmuch as it merely restates the requirements that one who aids and abets must have engaged in "a voluntary act or omission" with "the specific intent that [such] act or omission bring about the underlying crime." *See United States* v. *Zambrano*, 776 F.2d 1091, 1097 (2d Cir. 1985). The January 8 phone call would satisfy both requirements.

Desimone, 119 F.3d 217, 223 (2d Cir. 1997). The conviction must be affirmed "if, viewing all the evidence in the light most favorable to the prosecution, . . . '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Id.* (quoting *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979)).

However, Mrs. Sanders asserts that the sufficiency of the evidence against her must be judged *strictissimi juris*. "Courts use *strictissimi juris* only under very special circumstances." *United States* v. *Montour*, 944 F.2d 1019, 1024 (2d Cir. 1991). As the Seventh Circuit explained:

> When the group activity out of which the alleged offense develops can be described as a bifarious undertaking, involving both legal and illegal purposes and conduct, and is within the shadow of the first amendment, the factual issue as to the alleged criminal intent must be judged *strictissimi juris*. This is necessary to avoid punishing one who participates in such an undertaking and is in sympathy with its legitimate aims, but does not intend to accomplish them by unlawful means. Specially meticulous inquiry into the sufficiency of proof is justified and required because of the real possibility in considering group activity, characteristic of political or social movements, of an *unfair imputa tion of the intent or acts of some participants to all others*.

United States v. *Dellinger*, 472 F.2d 340, 392 (7th Cir. 1972) (emphasis added). The doctrine does not require evidence "so compelling that a verdict of not guilty would be perverse," and it does not wholly depriv[e] the jury of its customary function in interpreting ambiguous statements in the light of circumstances and choosing among reasonable inferences." *Id.* at 393.

We do not believe the *strictissimi juris* standard applies. Mrs. Sanders argues that, even though she made a phone call urging Capt. Stacey to take the samples, the call took place after he had already done so. Mrs. Sanders does not dispute that she made the phone call, and there is no question here of imputing intent or any other act to Mrs. Sanders to establish her participation in the crime. The sole issue here is whether the phone call was made before or after Capt. Stacey removed the samples, and as usual, it was the jury's prerogative to interpret ambiguous statements and to choose among reasonable inferences. The jury was entitled to credit Capt. Stacey's testimony that the phone call from Mrs. Sanders took place while he was deciding whether to take the samples, so the evidence was sufficient to establish that she entered into the conspiracy and aided and abetted the underlying crime.

V. *Wrongful Intent*

Finally, the defendants argue that they were entitled to instructions requiring the jury to find "guilty intent" before the jury could convict. The defendants rely on *Morissette* v. *United States*, 342 U.S. 246 (1952), in which the Supreme Court held that a criminal intent element was implicit in certain federal crimes "incorporated from the common law." *Id.* at 262. The statute interpreted in *Morissette* sanctioned anyone who "embezzles, steals, purloins, or knowingly converts . . . any record, voucher, money, or thing of value of the United States." *See id.* at 248 n.2 (internal quotation marks omitted). The Court read a criminal intent requirement not only into the crimes that did not include an express *mens rea* element, but also into the crime of knowing conversion. *Id.* at 263-73. The defendants contend that a similar criminal intent element should be implied in section 1155(b), supplementing the knowledge requirement stated in the statute.

Contrary to the defendants' position, the Court recognized that the intent element was not a necessary element of every federal offense. *See id.* at 253 (referring to the "century-old but accelerating tendency . . . to call into existence new duties and crimes which disregard any ingredient of intent"). Furthermore, since *Morissette* it has become clear that knowledge may suffice for criminal culpability if "extensive enough to attribute to the knower a 'guilty mind,' or knowledge that he or she is performing a wrongful act." *See United States* v. *Figueroa*, 165 F.3d 111, 115-16 (2d Cir. 1998).

The elements of section 1155(b) are the knowing, unauthorized removal of parts or property from a civil aircraft that has been involved in an accident. It is common knowledge that airplane crashes are the subject of exhaustive investigation and study by government agencies, so " 'one would hardly be surprised to learn' " that the unauthorized removal of parts or property from a crash site " 'is not an innocent act.' " *See id.* at 116 (quoting *United States* v. *Freed*, 401 U.S. 601, 609 (1971)). One who knowingly removes parts or property from an airplane that had been involved in a crash has "sufficient knowledge to recognize that they have done something culpable." *Id.* at 118. Therefore the district court properly refused to instruct the jury that it must find an additional element of "wrongful intent" in order to convict.

CONCLUSION

The district court's judgment is affirmed.

[Appendix B - Order of the United States Court of Appeals for the Second Circuit (Denying Petition for Rehearing), July 21, 2000 Pages 22a – 23a]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 1007

ROSEANN B. MACKECHINIE
CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 21st Day of July, two thousand.

Present:

Hon. Thomas J. Meskill

Hon. Sonia Sotomayor

CIRCUIT JUDGES,

Hon. John F. Keenan*

DISTRICT JUDGE,

UNITED STATES OF AMERICA,

Appellee,

v.

Docket No. 99-1430

ELIZABETH SANDERS and JAMES SANDERS,

Defendants-Appellants.

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* Honorable John F. Keenan, United States District Judge for the Southern District of New York, sitting by designation.

by Elizabeth Sanders and James Sanders,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk

By: _____

Beth J. Meador,
Administrative Attorney

[Appendix C - Opinion of the United States District Court for the Eastern District (Denying Motion for Discovery), August 27, 1998 Pages 24a – 43a]

United States District Court,
E.D. New York.

UNITED STATES of America,
v.
James SANDERS and Elizabeth Sanders, Defendants.

No. 98-CR-013 (JS).

Aug. 27, 1998.

Benton Campbell, Assistant United States Attorney, Brooklyn, NY, for U.S.

Jeffrey Schlanger, New York City, for Defendant James Sanders.

Jeremy Gutman, New York City, for Defendant Elizabeth Sanders.

MEMORANDUM AND ORDER

SEYBERT, District Judge.

Pending before the Court is defendants' joint motion for pretrial discovery relating to their defenses of selective and vindictive prosecution. The defendants were indicted on January 6, 1998 under 49 U.S.C. § 1155(b), which prohibits the unauthorized removal of aircraft parts from any plane involved in a civil aviation accident, and for conspiracy to violate the statute. The two count indictment alleges that between October 1996 and July 1997, the defendants conspired to remove a portion of a seat cushion from the interior cabin of the now-infamous TWA Flight 800. The defendants allegedly conspired with Terrell

Stacy, a former TWA pilot, to have him cut a piece of the fabric from the cushion that was being stored in a secured hangar Calverton, New York during the accident investigation of the National Transportation Safety Board ("NTSB") and the Federal Bureau of Investigations (the "FBI"). The defendants allegedly sought the material because it contained samples of a reddish brown residue, which defendant James Sanders believed would prove his theory that a Navy missile was responsible for the downing of Flight 800.

DISCUSSION

The defendants have jointly moved for discovery pertaining to their claim that the determination to bring criminal charges against them was motivated by the Government's desire to retaliate against them for exercising their First Amendment free speech rights, as well as to chill those rights. Thus, defendants purport to seek discovery of information and documents in the Governments' possession that are relevant to the Government's decision-making process and its motives for prosecuting the present case. [FN1]

> FN1. Defendants have failed to indicate exactly what documents they believe the government has that would prove a speech-based animus in bringing this prosecution. Although they point to discussions with the prosecution regarding discovery requests, the Court has reviewed those requests and find that the bulk of items they still seek relate to data and documents relating to the crash itself rather than the prosecution.

As a preliminary matter, the Court must address the defendants' contention that their conduct in obtaining the fabric from the wreckage was protected by a First Amendment "newsgathering" privilege. *See United States v. Cutler*, 6 F.3d 67 (2d Cir.1993);

United States v. Burke, 700 F.2d 70 (2d Cir.), *cert. denied*, 464 U.S. 816, 104 S.Ct. 72, 78 L.Ed.2d 85 (1983). Under this privilege, defendants contend that the acts the defendants are charged with all relate to the constitutionally protected process of newsgathering because James Sanders was a freelance journalist and was investigating the crash of Flight 800 for newsgathering purposes. Elizabeth Sanders, in assisting her husband, was also engaged in the newsgathering process.

While the Court recognizes that there is a "reporter's privilege" with respect to certain information subpoenaed in civil and criminal proceedings, this privilege clearly does not apply as a shield against prosecution for violation of laws of general applicability. Indeed, in *Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972), the Supreme Court stated that "the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability." Id. at 682, 92 S.Ct. at 2657. Thus, the press may not use First Amendment protection to justify otherwise illegal actions. See *United States v. Sanusi*, 813 F.Supp. 149, 155 (E.D.N.Y.1992) (citing *Associated Press v. NLRB*, 301 U.S. 103, 132-33, 57 S.Ct. 650, 656, 81 L.Ed. 953 (1937) ("The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.")). As Judge Weinstein aptly stated in *Sanusi*, "[b]ecause the press in certain circumstances may be able to resist the demands of a subpoena, does not mean the press may, simply by raising the cry of 'newsgathering,' exempt itself from all ordinary legal constraints." *Id.* (citing *Galella v. Onassis*, 487 F.2d 986, 995-96 (2d Cir.1973)) ("There is no threat to a free press in requiring its agents to act within the law.").

Accordingly, the Court rejects defendants' argument that they

are immune from prosecution for the acts alleged in the indictment on the basis of a newsgathering privilege. The Supreme Court has been clear that the "First Amendment confers no such immunity from prosecution." *Wayte v. United States*, 470 U.S. 598, 614, 105 S.Ct. 1524, 1534, 84 L.Ed.2d 547 (1985). The Second Circuit has reiterated this principle and found that where the facts involve the exercise of prosecutorial discretion and "speech" and "nonspeech" elements are combined in the same course of conduct, "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *United States v. Fares*, 978 F.2d 52, 59 (2d Cir.1992) (citing *Wayte*, 470 U.S. at 611, 105 S.Ct. at 1532). Indeed, the Court also notes that 49 U.S.C. § 1155(b), under which defendants are indicted, does not facially implicate First Amendment concerns and the defendants do not raise any challenges to the statute itself as a valid exercise of government power.

The Court now turns to defendants' motion for discovery relating to their defenses of selective and vindictive prosecution.

I. STANDARDS GOVERNING MOTIONS FOR CRIMINAL DISCOVERY

A selective prosecution claim is not a defense on the merits to a criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution. *United States v. Armstrong*, 517 U.S. 456, 463, 116 S.Ct. 1480, 1486, 134 L.Ed.2d 687 (1996). The standard for demonstrating selective prosecution, however, is a "rigorous" one. See id. at 468, 116 S.Ct. at 1488. To prevail on such a defense requires the defendants to overcome the strong presumption of regularity on the part of federal prosecutors, and "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *Id.* at

464, 116 S.Ct. at 1486 (quoting *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15, 47 S.Ct. 1, 6, 71 L.Ed. 131 (1926)). In the ordinary case, therefore, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." Id. (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S.Ct. 663, 668, 54 L.Ed.2d 604 (1978)).

Before the defendants are entitled to discovery or an evidentiary hearing on a claim of selective prosecution, they must make two showings. First, the defendants must present at least " 'some evidence tending to show the existence of the essential elements of the defense.' " *Fares*, 978 F.2d at 59 (quoting *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir.1974)). This standard applies whether termed as providing a "colorable basis," "substantial threshold showing," "substantial and concrete basis," or "reasonable likelihood." *See Armstrong*, 517 U.S. at 468, 116 S.Ct. at 1488. Second, the defendants must show that the documents in the government's possession would indeed be probative of these elements. *See Fares*, 978 F.2d at 59 (quotation omitted). The basis for this requirement is to prevent unwarranted fishing expeditions to obtain documents to which the defense normally would not be entitled. *See Berrios*, 501 F.2d at 1211.

Accordingly, under the Armstrong standard, a defendant must make at least "a credible showing of different treatment of similarly situated persons" to establish a colorable basis for a finding of discriminatory effect and consequently to become eligible for discovery. *See Armstrong*, 517 U.S. at 470, 116 S.Ct. at 1489; *see United States v. Al Jibori*, 90 F.3d 22, 25 (2d Cir.1996). In this regard, mere assertions and generalized

proffers on information and belief are insufficient. *Fares*, 978 F.2d at 59.

A. Evidence Establishing the Elements of the Defense

The prima facie elements of a claim for selective prosecution are twofold. The defendants must first show that they have been singled out for prosecution while others "similarly situated" have not generally been prosecuted for the same type of conduct forming the basis of the charges against them. *See United States v. Moon*, 718 F.2d 1210, 1229 (2d Cir.1983), *cert. denied*, 466 U.S. 971, 104 S.Ct. 2344, 80 L.Ed.2d 818 (1984) (quotation omitted). If the defendants can establish that "similarly situated" persons were not prosecuted, they must then show that the government's discriminatory selection of the defendants for prosecution has been invidious or in bad faith; i.e., based upon such impermissible considerations as race, religion, or the desire to prevent their exercise of their constitutional rights. *Id.* In this case, therefore, the defendants have the demanding burden of producing some evidence tending to show both that "similarly situated" individuals were not prosecuted and that the decision to prosecute them was animated by a desire to "chill" the exercise of defendants' First Amendment rights or to retaliate against them for the exercise of constitutional rights. *See Armstrong*, 517 U.S. at 469, 116 S.Ct. at 1488.

1. "Similarly Situated" Individuals

To sustain their burden with respect to identifying "similarly situated" individuals, defendants point to two facts. First, they believe that there must be "numerous incidents" of souvenir hunters who have stolen parts of aircraft wreckage, which was also an offense under § 1155's predecessor statute enacted in

1962, Pub.L. 87-810. This speculation, however, is insufficient to provide some credible evidence establishing that others similarly situated were not prosecuted. In *Berrios*, the Second Circuit expressly rejected a nearly identical argument by the defense and found that a proffer stating that the defendant and his attorney believed that there were "hundreds" of unprosecuted persons similarly situated to defendant was insufficient because it failed to identify any unprosecuted violators. See 501 F.2d at 1211.

Second, the defendants also suggest that James Kallstrom, the Assistant Director in Charge of the New York FBI Office, is a similarly situated person who was not prosecuted. James Sanders himself describes Kallstrom as the FBI official in charge of the Flight 800 investigation. Sanders Aff. ¶ 21. Nevertheless, defendants assert that Kallstrom was not prosecuted after it was reported that he removed an American flag found among the wreckage and presented it to the son of one of the victims. The Court easily rejects this comparison. First, § 1155(b) clearly provides that only "unauthorized" removal of aircraft wreckage is a violation. [FN2] Second, Mr. Kallstrom's action in presenting an American flag to the son of one of the victim's as an official act can hardly be considered to be "conduct of the type forming the basis of the charge" against these defendants. See Moon, 718 F.2d at 1229.

> FN2. Defendants assert that the government has failed to provide any evidence that Mr. Kallstrom actually was "authorized" to make this presentation. The Court rejects this argument as well. Initially, the Court notes that it would be hard pressed to conclude that the FBI official in charge of the investigation would not be authorized to make an official presentation such as here. Moreover, the burden is not upon the government to

establish that Mr. Kallstrom was not similarly situated; rather, the burden is on defendants to provide evidence that he was similarly situated. They have failed in that regard.

The government, on the other hand, has provided a copy of a 1996 criminal information and complaint in the Southern District of Florida against Michael Gadsden, a man accused of removing wreckage from the Valujet crash in the Everglades in 1996. Gadsden was an employee under contract to remove the remaining aircraft parts from the crash site and deliver it to a hangar for investigation by the NTSB and the FBI. A search of Gadsden's apartment revealed that he unlawfully possessed a circuit breaker panel and a portion of the aircraft fuselage that Gadsden had kept as "souvenirs." Like the Sanders, Gadsden was prosecuted pursuant to 49 U.S.C. § 1155(b).

The defendants raise a number of arguments attempting to distinguish the prosecution of Gadsden. For example, they point to the fact that he was also accused of denying having the wreckage parts when interviewed by the FBI and that there is no evidence that Gadsden would have been prosecuted if he had not lied to federal agents. [FN3]. In addition, the part stolen by Gadsden was a circuit breaker relevant to the investigation of the crash. Here, however, they claim that their conduct is minimal in comparison because there was ample other seat portions available for government testing and the fabric was not "vital to the accident investigation." Pub.L. 87-810. Defendants also suggest that Gadsden's motive for removing the wreckage as a souvenir also falls squarely within the purpose of § 1155(b) to stop souvenir hunters from carrying off parts of aircraft wreckage. In this case, on the other hand, the parts were taken not as souvenirs, but to further the investigation of the cause of the explosion. Finally, the Sanders suggest that a distinction

exists because they were not the principals who removed the property and the government has failed to uncover any instances of "accessorial liability" under the statute that have been prosecuted. They conclude that to be "similarly situated," a defendant would have to have done no more than relay a journalist's desire for such material to a participant in the official investigation to be prosecuted. The Court simply disagrees with this latter assertion. The indictment charges much more than a simple relay of a message from Sanders to Stacy; rather, the indictment charges that the Sanders actively conspired to have the fabric removed from the hangar and delivered to James Sanders.

> FN3. Nor have defendants pointed to any evidence suggesting that he would not have been prosecuted if he had not lied to officials.

The Court rejects defendants' attempt to distinguish the Gadsden prosecution. The burden is on defendants to provide some evidence establishing that another individual was not prosecuted for conduct similar to that of their own. In their moving papers, they make the speculative assertion that there must be "numerous incidents" of souvenir hunters from aircraft crash sites that could have been prosecuted under 49 U.S.C. § 1155(b) or its predecessor statute and were not. When the government came forward with an example of such a souvenir hunter who was charged with a violation of § 1155(b), they then switched their position to claim that souvenir hunters are not similarly situated. Moreover, the Court finds that the prosecutions of Gadsden and the Sanders are sufficiently similar to convince the Court that the defendants have failed in their efforts to establish evidence tending to support the first prong of a selective prosecution defense. On this basis alone, the Court could deny the motion for discovery. Notwithstanding, the

Court will consider the second element of their selective prosecution claim.

2. Impermissible Considerations

The defendants contend that they have provided sufficient evidence to meet their threshold showing that the present prosecution was motivated by a desire to chill the defendants' exercise of rights protected under the First Amendment, or to retaliate against them for exercising those rights. In support of this argument, they rely on the Second Circuit's decision regarding a motion to dismiss in a § 1983 action, *Gagliardi v. Village of Pawling*, 18 F.3d 188 (2d Cir.1994), for the proposition that retaliatory intent can be inferred from the chronology of events in the government's conduct. *See* 18 F.3d at 195.

Specifically, the defendants point to the following "evidence" of a discriminatory or retaliatory animus:

(1) On March 10, 1997, the Riverside *Press-Enterprise* published a front page story reporting Mr. Sanders' acquisition of a sample of red residue from TWA Flight 800 and his conclusion that the residue was solid missile fuel.

(2) On March 11, 1997, during testimony before the House of Representatives, a senior NTSB official attempted to discredit Mr. Sanders' theory and stated on the record that "there is no such thing as a red residue trail in that airplane," In complete contradiction, FBI Special Agent James Kinsley stated in his affidavit supporting defendants' arrest warrants on December 5, 1997 that "[f]rom Row 17 to Row 28 of the seating area, there is a reddish residue on the metallic frame and backs of the passenger seats" that is "manifested strongly on seats from Rows 17 through 19."

(3) Within hours after the publication of the Press-Enterprise

article, the FBI initiated aggressive efforts to question Elizabeth Sanders, although she stated that she did not wish to speak with the FBI.

(4) Also immediately following the publication of the *Press-Enterprise*, grand jury subpoenas were issued to obtain Mr. Sander's testimony, as well as toll records from the Sanders' telephone service provider, even though it was obvious that Mr. Sanders was acting as a journalist. The Department of Justice concedes that it approved these subpoenas in violation of its own rules regarding seeking subpoenas relating to members of the news media. *See* 28 C.F.R. § 50.10. [FN4]

> FN4. As to the violation of 20 C.F.R. § 50.10, the government points out that once it was discovered that Sanders was a member of the media and was publishing a book on the subject, they sought and obtained nunc pro tunc approval from the Attorney General on August 21, 1997.

(5) In April 1997, prosecutors threatened James Sanders with prosecution if he would not reveal his confidential source within the FBI/NTSB crash investigation. Mr. Sanders refused to cooperate on the basis of his First Amendment rights. At the same meeting, prosecutors also threatened to make Elizabeth Sanders a target if she did not agree to cooperate in the investigation of her husband, even though at that time they had absolutely no evidence of her involvement.

(6) In late April 1997, James Sanders published his book, *The Downing of TWA Flight 800*, which also detailed the information he had gathered and asserted that the government was covering up the fact that the flight was downed by a Navy missile. The book's acknowledgments thanked Elizabeth Sanders.

(7) Shortly after publication of this book, the FBI attempted to

question Elizabeth Sanders' supervisor and another close friend and colleague.
(8) The government issued a second subpoena for James Sanders' telephone records in August 1997, again in violation of 28 C.F.R. § 50.10. [FN5]

FN5. See supra note 3.

(9) Mr. Sanders filed Freedom of Information Act ("FOIA") requests in August, September and October 1997, seeking information relating to FBI Assistant Director James Kallstrom, FBI Special Agent James Kinsley, Assistant United States Attorney Valerie Caproni and Assistant United States Attorney Benton Campbell.
(10) On November 18, 1997, Mr. Sanders reported to a New York Post reporter that he was using the FOIA requests to investigate the prosecutors and FBI agents involved in the investigation of him and his wife.
(11) On November 19, 1997, the Post reporter published an exclusive story, quoting Valerie Caproni of the United States Attorney's Office for the Eastern District of New York as stating that the Justice Department was not required to follow its regulations because there was no basis to conclude that Mr. Sanders was acting as a reporter and that charges would be filed within two weeks.
(12) On December 5, 1997, FBI Agent Kinsley's affidavit in support of defendants' arrest warrants was released to the press without notification to the Sanders or their attorneys. On the same day, the FBI issued a press release stating that James Sanders had misrepresented the results of his lab reports of the red residue.
(13) In December 1997, at the time defendants surrendered, Agent Kinsley arranged to have the defendants paraded in front of the press in their handcuffs even though more discreet

actions could have been taken.
(14) On December 12, 1997, Terrell Stacy, the Sanders' contact inside the investigation, stated during his plea allocution that he took the fabric samples on his "own volition" and gave them to James Sanders to analyze.
(15) On January 6, 1998, the Sanders were then indicted four weeks later on the grounds that they orchestrated the efforts to have Stacy remove the fabric samples.

On the basis of this chronology, the defendants argue that they have made the required threshold showing that the government's instigation and indictment of the Sanders was in retaliation for their efforts to publicize their theory that a Navy missile was the cause of the Flight 800 explosion. The defendants thus point to three triggering events for the retaliation: (1) the publication of the initial article in the Press-Enterprise, which resulted in aggressive questioning of both James and Elizabeth Sanders, threatening indictment of Elizabeth and disregarding DOJ's own regulations in subpoenaing records; (2) the publication of James Sanders' book, which resulted in heightened questions of Elizabeth Sanders' colleagues and friends and additional improper subpoenas; (3) the FOIA request for information regarding the U.S. Attorneys and FBI agents involved, which resulted in defendants arrest and arraignment, the press release again discrediting Sanders' conclusions and the public humiliation during the Sanders' surrender.

The Court has reviewed these allegations and finds that the defendants have failed to establish a substantial and concrete basis sufficient to allow further discovery to overcome the presumption of regularity on the part of federal prosecutors. *See Armstrong*, 517 U.S. at 464, 116 S.Ct. at 1486.

First, as the government points out, *Gagliardi* involved the

burden of proof necessary to survive a motion to dismiss in the civil context on a claim of unlawful retaliation. The precedent set forth in *Armstrong*, *Berrios* and *Fares* make clear that a defendant seeking discovery on selective prosecution and vindictive prosecution claims bears the burden of making a credible showing of some evidence before discovery will be provided. Although the Court does recognize that circumstantial evidence is relevant and admissible in both the criminal and civil context, the circumstantial evidence presented in the chronology above does not persuade the Court that this is credible evidence that tends to show the existence of a discriminatory or retaliatory animus against the defendants.

Perhaps defendants' chronology would have more weight if James Sanders in the March 10, 1997 *Press-Enterprise* article had merely propounded his theory that a missile downed Flight 800. The article, however, goes much further. It expressly states that "He used classified documents obtained from a confidential source inside the official investigation," "Someone whom Sanders declined to identify passed him a 104-page printout of the FBI-NTSB catalog of every article recovered from the undersea crash site," that "Sanders said he later obtained samples of the residue" and that "The residue test was initiated by James Sanders, who said he obtained pieces of one of the seats." Prominently placed on the front page of the newspapers is a also color photograph of the "samples of seat material with residue." Based on these statements, the Court agrees with the Government that the article raised serious doubts about the security of the hangar and clearly indicated a potential violation of 49 U.S.C. § 1155(b).

As to the April 1997 meeting, the Government asserts that prosecutors attempted to gain James Sanders' cooperation in locating the source inside the NTSB investigation who was

providing portions of the wreckage to him. When Sanders indicated that he would rely on the "shield law" to protect his source, the Government informed Sanders that his refusal to cooperate may lead to his own indictment. The Court agrees that this chronology does not present objective evidence of vindictiveness. *See, e.g., United States v. Goodwin*, 457 U.S. 368, 383, 102 S.Ct. 2485, 2494, 73 L.Ed.2d 74 (1982) (pursuing felony charges after defendant rejects misdemeanor plea is not vindictive prosecution); *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S.Ct. 663, 668, 54 L.Ed.2d 604 (1978) (no vindictive prosecution when the government presents the defendant with the "unpleasant alternatives" of forgoing trial or facing charges on which he was plaintiff subject to prosecution).

The Government also denies that it threatened to charge Elizabeth Sanders at this meeting. Rather, Government prosecutors asked Jeffrey Schlanger to ask Ms. Sanders whether she would meet with investigators for an interview, and Mr. Schlanger said he would communicate the request. Mr. Schlanger later informed government officials that she would not consent to an interview on the grounds of her spousal and Fifth Amendment privileges. Sanders was informed at the meeting, however, that if the investigation revealed involvement of his wife, who was a TWA employee, there was no guarantee that she would not be prosecuted. Regardless of this apparent factual dispute as to what exactly was stated at this meeting, the Court finds that any potential "threats" of indictment based on either of the defendants' failure to cooperate in the investigation does not support their contention of selective or vindictive prosecution for the reasons stated above.

As to the November 1997 FOIA requests regarding FBI Assistant Director James Kallstrom, FBI Special Agent James Kinsley, AUSA Valerie Caproni and AUSA Benton Campbell

and the New York Post article on November 19, 1997, the Court also agrees with the Government that these events do not make a "credible showing" of vindictiveness to warrant discovery. The Government has provided a letter from the Department of Justice indicating that the decision to prosecute James and Elizabeth Sanders was made in September 1997, when prosecutors requested authorization from the Attorney General to indict them for their involvement with the removal of the fabric from Flight 800. That authorization was granted on November 17, 1997, and defendants were arrested shortly thereafter. Govt. Ex. D. Any link between the FOIA requests, the information in the Post and the arrest appears to be speculative at best, which is insufficient to meet the required threshold showing. *See Fares*, 978 F.2d at 60. As noted in *Moon*, "highly visible cases will always engender some suspicion with respect to the government's bona fides. But to engage in a collateral inquiry respecting prosecutorial motive, there must be more than mere suspicion or surmise." 718 F.2d at 1230.

The Court also notes that in light of the fact that the decision to prosecute was made in September 1997, the defendants "additional evidence" of a December 5, 1997 Department of Justice press release, in which the Government again attempts to discredit Sanders' theory, does not alter this result. The fact that government investigators disagree with Mr. Sanders' conclusions does not indicate to the Court that there was a speech-based animus underlying the present prosecution. Similarly, the Court does not find that the defendants can meet their burden under *Armstrong* through their general assertions that this prosecution is unjustified and unwarranted because it was a "crime without a victim" and because there was more than sufficient residue left for government testing.

Accordingly, the Court concludes that the defendants have failed to provide any credible evidence tending to substantiate their claims that there were others who were similarly situated and not prosecuted and that the decision to prosecute was based on a desire to silence Mr. Sanders' theory that a missile downed Flight 800. The Court now considers defendants' claim for discovery of the defense of vindictive prosecution.

II. STANDARDS GOVERNING CLAIMS OF VINDICTIVE PROSECUTION

The doctrine of prosecutorial vindictiveness has its roots in two Supreme Court decisions: *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969) and *Blackledge v. Perry*, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974). *United States v. King*, 126 F.3d 394, 397 (2d Cir.1997), *cert. denied*, 523 U.S. 1024, 118 S.Ct. 1308, 140 L.Ed.2d 472 (1998). The tenet has developed from these cases that due process is violated when actual vindictiveness plays a part in a prosecutorial or sentencing decision, and thus even the appearance of vindictiveness must be avoided. *See King*, 126 F.3d at 397. Thus, although the decision as to whether to prosecute generally rests within the broad discretion of the prosecutor, *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S.Ct. 663, 668, 54 L.Ed.2d 604 (1978), the decision to prosecute violates due process when the prosecution is brought in retaliation for the defendant's exercise of his legal rights. *United States v. White*, 972 F.2d 16, 19 (2d Cir.), *cert. denied*, 506 U.S. 1026, 113 S.Ct. 669, 121 L.Ed.2d 593 (1992) (citing *Blackledge*, 417 U.S. at 27, 94 S.Ct. at 2102; *United States v. Khan*, 787 F.2d 28, 31 (2d Cir.1986)).

The need to avoid the appearance of vindictiveness has taken the form of a rebuttable presumption of vindictiveness. *King*,

126 F.3d at 397 (citing *United States v. Goodwin*, 457 U.S. 368, 373, 102 S.Ct. 2485, 2488-89, 73 L.Ed.2d 74 (1982)). This presumption, however, is applied only when the circumstances of a case pose a "realistic likelihood" of such vindictiveness. Id. (citation omitted). When the presumption is applied, it may be rebutted "by objective evidence justifying the prosecutor's action." *Id.* (quoting *Goodwin*, 457 U.S. at 376 n. 8, 102 S.Ct. at 2490 n. 8).

The Second Circuit in *White* held, however, that this "Circuit has limited the application of such a presumption to prosecutions brought after post- conviction activity of defendants." 972 F.2d at 19 (citing *Lane v. Lord*, 815 F.2d 876, 878 (2d Cir.1987)). Consequently, the "presumption of prosecutorial vindictiveness does not exist in a pretrial setting." Id. (quoting *United States v. Hinton*, 703 F.2d 672, 678 (2d Cir.), *cert. denied*, 462 U.S. 1121, 103 S.Ct. 3091, 77 L.Ed.2d 1351 (1983)).

A defendant claiming vindictive prosecution must show that (1) the prosecutor harbored genuine animus toward the defendant, or was prevailed upon to bring the charges by another with animus such that the prosecutor could be considered a "stalking horse," and (2) he would not have been prosecuted except for the animus. *United States v. Aviv*, 923 F.Supp. 35, 36-37 (S.D.N.Y.1996) (citations omitted). Where as here there is no presumption of vindictiveness, and as with a claim for selective prosecution, to obtain discovery the defendant must show a "colorable basis" for the claim that the prosecution was the product of vindictive retaliation. *Aviv*, 923 F.Supp. at 37. The standard, as stated above, requires the defendant to offer some evidence supporting both elements of the claim. *Aviv*, 923 F.Supp. at 37.

Importantly, the Second Circuit in White found that allegations of vindictiveness based upon alleged government violations of its internal guidelines and alleged improper supervision of the Assistant United States Attorney were also insufficient to warrant a finding of vindictiveness. Rather, the defendant must come forward with "proof of actual vindictiveness in the form of objective evidence that overcomes the presumption of legitimacy of the prosecutor's charging decision." 972 F.2d at 19 (citing *Goodwin*, 457 U.S. at 384 n. 19, 102 S.Ct. at 2494 n. 19). Accordingly, the Court rejects defendants' contention here that the failure to gain Department of Justice approval to subpoena Mr. Sanders' telephone records, which was obtained *nunc pro tunc* in any event, provides objective evidence of vindictiveness.

The defendants also contend that the substantial evidence tends to show that the government's animus against them arises from an interest in suppressing their theory that a missile caused the Flight 800 crash. The "objective evidence" in support of this argument is based on what defendants feel is proof that the actual cause of the crash was a missile. In addition, they point to "misrepresentations" about the NTSB's test results finding that the reddish brown substance was an adhesive used on the seats in question. They also make semantical arguments as to the government's use of the term aircraft "wreckage" to characterize the fabric that was removed and whether Sanders gave Stacy "persistent instructions" to remove the fabric.

The Court finds that any evidence that defendants may have or want regarding the validity of the NTSB's determination as to the cause of the Flight 800 crash does not weigh in favor of overcoming the presumption of regularity in the prosecution of this action. The inquiry in a vindictive prosecution defense is whether but for vindictiveness on the part of the prosecution the

indictment would have been sought. In light of the plain statements in the March 10, 1997 article and the evidence that subsequently came to light, the Court cannot conclude that there is any objective and direct evidence indicating a vindictive motive to quash the Sanders' constitutional right to hypothesize at will over the cause of the crash. Rather, the only objective evidence presented is that James Sanders published an article clearly indicating his possession of a piece of the Flight 800 aircraft and his ability to obtain it along with other information from a source inside the secured hangar in Calverton, New York. There is nothing in this objective evidence to overcome the strong presumption of prosecutorial regularity.

CONCLUSION

For the foregoing reasons, the defendants' joint motion for pretrial discovery is denied.

SO ORDERED.

[Appendix D - Ruling of the United States District Court for the Eastern District (Denying Motion to Dismiss Indictment), April 5, 1999 Pages 44a – 46a]

U.S.A. VS. JAMES & ELIZABETH SANDERS

THE COURT: The first motion again is to dismiss the Indictment on First Amendment grounds. It basically is the same type of arguments that were initially raised by the defendants and unless there is anything else that you want to include in your papers, I am ready to rule on that.

Essentially, this is the conduct that the defendants are asking to be excusable because of the higher purpose of serving to have Mr. Stacey steal the fabric from the airplane wreckage, and your claim is that their motivation here should control and the indictment should be dismissed against them.

The reasons that I gave the last time in my decision Bransberg versus Hayes, which is a Supreme Court decision, 408 U.S. 665, 1972 support the argument that there is a claim of interference with efforts to gather news that should be judged on the facts by striking a proper balance between the freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.

However, the response of the government is controlling herein that the First Amendment doesn't

shield defendants from indictment and prosecution, and that contrary to your argument that there is this qualified privilege for news gathering when there is a strong interest in investigating and reporting news, the government has brought in the Cohen case, Cohen versus Cowles, C-O-W-L-E-S, which is also a Supreme Court case at 501 U.S. 663, 1991.

In that the government argues that the Supreme Court has really flatly rejected this approach of balancing that the defendants have been advocating here. That there is a well established line of decisions that stand for the proposition that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has some incidental effects on the press' ability to gather news.

Specifically, the Court held in Cohen that the truthful information sought to be published must have been lawfully acquired. That really is the test here. The press, the Court further went onto hold, may not with impunity break and enter an office or dwelling to gather news. It went on to say, accordingly, in that situation the enforcement of such general laws against the press is not subject to a stricter scrutiny than would be applied to enforcement against other persons or organizations.

The government has also suggested that the Bransberg Court dismissed this balancing test and that was done in the balancing test that Justice Powell's concurrence suggested.

For the reasons that I previously have given I am not going to dismiss this indictment and I am denying your motions at this point in time.

[Appendix E - Ruling of the United States District Court for the Eastern District of New York (Denying Defendants' Charge Requests), April 9, 1999 Pages 47a – 49a]

MR. GUTMAN: Your Honor, we stand by all of our previously submitted requests and object to the extent that they are not incorporated into the language of the charge.

I would specifically call your attention to request number five, which is the defense's contention which I believe addresses the thrust of the my objection on the intent issue, and also on the question of property -- I don't know if this was on the record -- that our view is that the term "property" should be defined in a way that would prevent an overbroad application of the statute. And that's what we think results if the jury is allowed to treat an object that has no value and the removal or concealment of which has no discernible effect on any one or any thing.

And I believe the defense contention, which is in request number five would address that concern, and that in the absence of either the other charges we talked about or at the very least this charge, that there would be an unconstitutional application of the statute both as a matter of due process and under the circumstances of this case because it has a chilling effect on exercise of First Amendment rights. So we ask the Court to

In addition, I think the Court is aware that the Second Circuit has innumerable times ruled that the defense is entitled to a charge on its theory of the case.

THE COURT: I reviewed the cases you have submitted again.

MR. GUTMAN: Thank you.

THE COURT: However, there is no requirement in this particular statute that would leave me to believe that the property has to be of independent value as you request in your charge. It is just not there. It is not one of the elements. I didn't draft it.

MR. GUTMAN: It could be clearer. My position isn't based on the language of the statute or the statute itself. It is based on the Constitution.

THE COURT: The constitutional premise that unless one has notice that the property has to be of no value, then it is too broad, the application --

MR. GUTMAN: That an application that could -- that -- yes, it has to be something that a reasonable person would have notice -- would be on notice could be a violation of the law, and that will not sweep within its orbit a type of activity that is wholly innocent.

THE COURT: The language that you have in here is not consistent with the elements as I have

defined or the evidence in this case. Therefore, I decline to put in your request number five and your request number two in particular.

[Appendix F - Defendants' Requests to Charge
(Requests No. 2 and 5) Pages 50a – 52a]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA,

-against- 98 Cr. 13 (JS)

JAMES SANDERS and
ELIZABETH SANDERS

Defendants.

----------X

DEFENDANTS' REQUESTS TO CHARGE

Pursuant to Fed R. Crim. P. 30, defendants James Sanders and Elizabeth Sanders respectfully request that the Court include the following in its instructions to the jury.

REQUEST NO. 2

WRONGFUL INTENT

Finally, to be guilty under section 1155(b) of Title 49, a person must have acted with a *wrongful* intent. This means that the person must have understood that the removal, concealment, or withholding of the part or property in question would result in some deprivation or injury. If, for example, a person genuinely believed that property was worthless and that its removal would have no effect on anyone, his willful removal of that property would not be accompanied by a wrongful intent, and he could not be found under this statute.[2]

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[2] See *Morisette v. United States,* 342 U.S. 246, 276, 72 S.Ct 240, 256 (1952) (the fact that removal of property on posted government property was a conscious and intentional act did not obviate the need to establish that the removal was performed with wrongful intent; if the jury concluded that the property appeared to be "unwanted and abandoned junk, and that lack of any conscious deprivation of property or intentional injury was" was established by the defendant's testimony and other surrounding circumstances, guilt would not have been established.

REQUEST NO. 5

DEFENSE CONTENTION: INNOCENT INTENT

The defendants contend that the material that was removed constituted an insignificant quantity of the material that was available for testing, and that the material had no independent value. They contend that the government has failed to prove that they understood or believed that any injury or deprivation would result from the removal of the material.

If you find that the government has not refuted this contention--that it has not proven beyond a reasonable doubt that the defendants understood that the removal, concealment, or withholding of the material at issue here would cause some harm or deprivation -- you must find the defendants not guilty of the charges in the indictment.[5]

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[5] A defendant is entitled to have the trial judge indicate what the theory of defense is, and that the theory, if believed, justifies acquittal or negates a necessary element. *United States v. Regan*, 937 F.2d 823, 826-27 (2d Cir. 1991); *Unites States v. Durham*, 825 F.2d 716 (2d Cir. 1987).

Supreme Court, U.S.
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No. 00-673

In the

Supreme Court of the United States

ELIZABETH AND JAMES SANDERS,
Petitioners,
v.
UNITED STATES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF PETITIONERS

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49 U.S.C. § 1155(b) 1

In the

Supreme Court of the United States

No. 00-673

ELIZABETH AND JAMES SANDERS,
Petitioners,
v.
UNITED STATES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

Petitioner seeks review of his conviction under 49 U.S.C. § 1155(b) after he received material from a crash scene, and raises important issues concerning how federal officials chose to prosecute him, particularly by indicating that they would prosecute both him and his wife if he would not reveal his

[1] Pursuant to Sup. Ct. R. 37.6, counsel declares that *amicus curiae* authored this brief in total with no assistance from the parties. Additionally, no individuals or organizations other than the *amicus* made a monetary contribution to the preparation and submission of this brief. Written consent of all parties to the filing of the brief has been filed with the Clerk pursuant to Sup. Ct. R. 37.3(a).

confidential source.

The Reporters Committee agrees that a journalist's investigation of a highly controversial tragedy that led to a criminal conviction over his contacts with a source demands careful review to ensure that he has not been deprived of his First Amendment rights. This Court should accept review and correct the Second Circuit's determination that prosecutors exercising their powers are effectively exempt from considering the First Amendment rights of those they prosecute.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

SUMMARY OF THE ARGUMENT

The newsgathering process is protected — to some extent — by the First Amendment. That protection must be broad enough to provide meaningful judicial review of prosecutorial discretion in deciding whom to prosecute when that decision is allegedly made with the intent of punishing those with controversial views or those journalists who do not reveal their news sources to prosecutors.

Amicus Reporters Committee does not allege that such *animus* exists, and was not involved in the controversy below. Rather, it argues that courts must be willing to look closely at such allegations when they are made in relation to constitutionally protected activities, and must ensure that safeguards will

protect the important interests in newsgathering.

ARGUMENT

I. First Amendment protections for the newsgathering process must limit in some way prosecutors abilities to impede that process.

It is almost axiomatic to state that those who most need the protection of the First Amendment are those who advance the most controversial positions. James Sanders has staked out a controversial position by alleging that the TWA Flight 800 tragedy was caused by a missile; he can hardly be faulted for believing that the actions taken against him are colored at least in part by the revulsion federal officials have expressed for his theories.

The prosecution of James Sanders raises important constitutional concerns, simply because of the manner in which the process unfolded. After his theory was disclosed in a newspaper, Sanders was told that he and his wife would not be prosecuted for violations of federal law if he revealed his source. *Brief of Petitioner* at 4-5. His telephone toll records were subsequently subpoenaed, and the identity of his source was discovered. *Id.* at 5. Based on testimony from that source, they were convicted. *Id.* at 8.

In reviewing the convictions, the Second Circuit held that constitutional protections recognized by that circuit protecting journalists from being compelled to reveal their sources were of no benefit to James Sanders; that privilege applied to court action, and did not reach prosecutors' actions in using their discretion to decide whom they would prosecute. *U.S. v. Sanders*, 211 F.3d 711, 719 (2nd Cir. 2000).

Thus, meaningful review of prosecutors' actions that affect newsgathering was not available, and a journalist's discussions with a news source could be deemed a conspiracy to commit a crime. This should not be so in the absence of a rigorous First Amendment analysis, and review of this case will allow journalists to argue, as the petitioner says, for "necessary limits on prosecutorial conduct that impairs the constitutionally-protected ability to gather and report news." *Brief of Petitioner* at 16.

Sanders alleged below that the prosecution's pursuit of this case was fueled by a desire to punish him for promoting a theory that the government felt had been discredited and that allegedly created additional anguish for victims' families. 211 F.3d at 719. With such an allegation before the court, careful review of prosecutorial motives is certainly justified. While protecting the families of disaster victims is a noble endeavor, it does not justify a content-specific restriction of speech, much less a criminal prosecution for advocating a position contrary to the government's version of events.

A. The newsgathering process merits protection under the First Amendment.

Newsgathering does merit some degree of protection under the First Amendment. The guarantee of press freedom is meaningless if journalists do not possess a concomitant right to gather the news. As the Justice Department has long acknowledged:

> Because freedom of the press can be no broader than the freedom of reporters to investigate and report the news, the prosecutorial power of the government should not be used in such a way that it impairs a reporter's respon-

> sibility to cover as broadly as possible controversial public issues.

28 C.F.R. 50.10 (2000) (Attorney General's "Policy with regard to the issuance of subpoenas to members of the news media").

This Court's holding that "without some protection for seeking out the news, freedom of the press could be eviscerated," *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972), has subsequently been cited repeatedly by a wide variety of courts to establish the general proposition that newsgathering process merits some degree of constitutional protection.

The *Branzburg* standard was utilized by this Court in laying the groundwork to establish that the public has a presumptive right of access to criminal trials. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 576 (1980). It has also influenced the standards of most of the federal circuits. *See, e.g., Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980) (recognizing the need for a "constitutionally sensitized balancing process" in determining whether to quash subpoenas); *Publicker Indus. v. Cohen*, 733 F.2d 1059 (3rd Cir. 1984)(recognizing a presumptive right of access to civil trials); *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999) (newsgathering right does *not* affect liability for generally applicable tort claims); *Davis v. East Baton Rouge Parish Sch. Bd.*, 78 F.3d 920 (5th Cir. 1996) (a court's gag order violated the media's First Amendment rights); *Boddie v. ABC*, 881 F.2d 267 (6th Cir. 1989) (finding a wiretapping law unconstitutionally vague); *Daily Herald Co. v. Munro*, 838 F.2d 380 (9th Cir. 1988) (law banning exit polling is unconstitutional).

But none of these cases seek to firmly establish the parameters of a right to gather the news. It remains for the courts to

determine the applicability of this right in each new setting, and review of the present case will allow the Court to determine how that right must influence the actions of prosecutors as they exercise almost unchecked discretion in deciding how and when to bring criminal actions. Allegations that prosecution was undertaken solely because a journalist refused to reveal the identity of a source demands careful examination because constitutional freedoms "are delicate and vulnerable, as well as supremely precious in our society" and "need breathing space to survive." *NAACP v. Button*, 371 U.S. 415, 433 (1963).

B. While this court has held that the First Amendment does not shield journalists from grand jury subpoenas, this case does not present the same considerations because application of the same logic would lead to a system without safeguards against abuse of the process.

This Court, while acknowledging that there must be some degree of constitutional protection for newsgathering, has not ruled on the scope of that protection, and indeed has found it easier to say when this undefined right is *not* violated by government action. In fact, in establishing the proposition in *Branzburg*, the Court then went on to decide that the newsgathering right does not create a privilege protecting a journalists from being compelled to testify before a grand jury.

But the foundations beneath the Court's conclusion do not exist in the present case. The *Branzburg* Court noted that a privilege would not be necessary to vindicate First Amendment interests because of traditional safeguards against abuse of the grand jury process, noting specifically, "Grand juries are subject to judicial control and subpoenas to motions to quash." *Branz-*

burg at 708.

In the present case, the Second Circuit eliminated any type of judicial review from the equation and specifically declined to weigh the interest in prosecution against journalists' rights. *Sanders* at 719 ("We decline.") Quoting this Court, the court further stated:

> Judicial deference to the decisions of these executive officers rests in part on an assessment of the relative competence of prosecutors and courts. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.

Id. at 720. The strength and deterrence value of the case and the government's enforcement interests, however, are utterly irrelevant to the issue of whether a journalist's First Amendment rights have been violated. These interests, then, can only be vindicated by careful judicial review in situations where prosecution follows a constitutionally based decision to keep a source's identity confidential. As the petitioner in the present case has argued,

> The strategy adopted by the government in the present case demonstrates how prosecutors can circumnavigate the safeguards contemplated in *Branzburg*. . . . By utilizing a unilateral executive branch mechanism – the threat of prosecution – the government also placed its effort to obtain information about a journalists' confidential source beyond the reach of the "judicial control" [*Branzburg*, 408 U.S. at 708] to which it would have

been subject in the context of a grand jury proceeding.

Brief of Petitioner at 18. By explicitly declining to enforce the safeguards against undue burdens on constitutional rights, the Second Circuit has left journalists with no means of protecting their rights.

CONCLUSION

The prosecution of James and Elizabeth Sanders raises serious questions about how prosecutors respond to journalists' First Amendment interests.

The First Amendment protections for newsgathering require, at a minimum, some safeguards from unrestrained prosecution while exercising a constitutional right. Granting certiorari will allow this court to define a remedy that will balance the need for prosecutorial discretion with the First Amendment interests of journalists.

A just resolution of the present case does not require a full articulation of a newsgathering right or privilege, and does not require this court to find that the government violated that right. Rather, this court should accept review to consider the question of whether a new trial is warranted because the defendant was not allowed to discover evidence related to questions concerning a claim that directly implicated First Amendment interests — namely, that his prosecution was pursued in retaliation for his refusal to reveal his source.